123-14

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

~~No. 214~~ 21

JOHN A. COAN, PLAINTIFF IN ERROR,

vs.

WILLIAM J. FLAGG.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED NOVEMBER 21, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 214.

JOHN A. COAN, PLAINTIFF IN ERROR,

vs.

WILLIAM J. FLAGG.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from court of common pleas of Scioto county	1	1
Petition	1	1
Answer	5	3
Reply	12	7
Demurrer	14	8
Journal entries	14	8
Judgment	15	9
Bill of exceptions	16	9
Deed from trustees of O. A. & M. College to Wm. J. Flagg	16	10
Title bond	22	13
Deed of David F. Heaton *et ux.* to Nicholas Longworth	26	15
Will of Nicholas Longworth	29	18
Testimony of Wm. J. Flagg	34	20
Mahlon G. Nichols	36	22
Joseph M. Smith	38	23
Chas. A. Barton	41	25
Adolph Caden	42	25
Henry Kuhns	43	26
John Larkins	44	26
Joseph Brown	44	26
Fred'k Weghorst	44	27
A. R. Colvin	45	27
Joseph Boland	45	28

JUDD & DETWEILER, PRINTERS, WASHINGTON

	Original.	Print.
Exemplifications of Virginia Land Office Exchange, Military Warrant No. 494, &c.	50	31
Testimony of Leonidas C. Heaton	56	35
Charles A. Barton (recalled)	57	35
Will of David F. Heaton and probate	58	36
Deed of Leonidas C. Heaton, executor, to D. M. Elliott	61	38
D. M. Elliott to John A. Coan	63	38
Testimony of Jno. B. Gregory	66	41
Solomon B. McCall	67	42
Laban W. Elliot	69	43
Samuel McGraw	69	43
Geo. H. Puntenney	70	44
Wash'n McGraw	71	44
Samuel Cooper	72	45
Wm. J. Flagg (recalled)	75	47
Henry McCall	76	47
Joseph Brown (recalled)	76	48
Adolph Caden (recalled)	76	48
Daniel McCarty	77	48
Exhibit A—Letter of Commissioner General Land Office to Jas. M. Trimble, December 23, 1872	83	52
B—Letter of Commissioner General Land Office to L. C. Heaton, June 18, 1873	83	53
C—Letter of Commissioner General Land Office to L. C. Heaton, July 11, 1873	85	54
D—Letter of Commissioner General Land Office to L. C. Heaton, October 10, 1873	86	54
E—Letter of Commissioner General Land Office to L. C. Heaton, October 29, 1873	87	55
F—Letter of Commissioner General Land Office to D. F. Heaton, Oct. 26, 1871, and field notes—	89	56
G—Letter of Commissioner General Land Office to W. J. Flagg, October 2, 1875	92	58
Reasons for new trial	93	59
Motion for new trial	95	60
Motion for leave to file petition in error	99	61
Notice of motion " " "	100	62
Order granting motion to file petition in error	103	63
Petition in error	104	64
Waiver of summons in error and appearance	107	65
Judgment	108	65
Certificate of supreme court of Ohio	109	65
Clerk's certificate	117	68
Writ of error	118	68
Return of writ of error	120	69
Citation	121	69
Proof of service of citation	122	70
Bond	123	70

1 *Petition in Error.*

In the Supreme Court of Ohio.

JOHN A. COAN, Plaintiff, *against* WILLIAM J. FLAGG, Defendant.

The petition in error seeks to reverse the judgment of the district court of Scioto county, rendered at a special term thereof December, A. D. 1877.

The following contains so much of the record and proceedings as are material to the determination of the questions involved:

Petition.

State of Ohio, Scioto County, Court of Common Pleas.

WILLIAM J. FLAGG, Plaintiff, *vs.* JOHN A. COAN, Defendant.

Said plaintiff says that he has the legal title to, is the owner of, and is in possession of the following described real estate, to wit, situate in Nile township, Scioto county, and within the Virginia military district of Ohio, and lying on the waters of Upper and Lower Twin creeks, and beginning at three white oaks on the
2 top of a ridge near a fence corner to survey No. 15886, and a southwesterly corner to survey No. 15499; thence with 3 lines of said survey 15499 N. 26 deg. W. 38 poles to a stake in place on eastern hillside, a few poles from the top in place of 3 hickories (gone); thence N. 21 deg. E. 56 poles, crossing ravines at 13 and 24 poles and top of ridge at 28 poles, a branch at 48 poles to a stake on southerly hillside in place of a white oak (gone); thence S. 64 deg. E. 82½ poles to along hillside, crossing point of hill and down a steep hill to 2 white oaks corner to same survey and corner to aforesaid survey 15886; thence with several lines thereof N. 16 deg. W. 41 poles to a beech and hickory; thence N. 22 deg. E. 57½ poles to a hickory; thence N. 4 deg. 30′ west 29½ poles to a large poplar; thence N. 59 deg. E. 16 poles to a large white oak (down); thence S. 33 deg. E. 36 p. to a stake in place of a white oak and poplar (gone); thence S. 13 deg. W. 57 p. to a white oak (down); thence S. 5¾ deg. E. 54 poles to a chestnut oak and black oak; thence S. 40 deg. 30′ E. 41½ poles to two chestnut oaks (one down), corner to said survey 15886 and corner to lot No. 102; thence with one line thereof S. 76¾ deg. E. 56 poles to a stone in a drain in place of 3 red buds (gone), N. W. corner to survey No. 14305; thence with one line thereof N. 51 deg. E. 21 poles to 2 small hickories and dogwood N. E. corner thereof and corner to lot No. 101; thence with one line thereof N. 42½ deg. E. 153 poles to a stake in the line of survey No. 15886; thence with lines thereof N. 41 deg. 10′ W. 48¾ poles to black gum in forks of branch; thence N. 8 deg. W. $\frac{4}{10}$ poles to a double poplar in a branch; thence N. 14 deg. W. 58½ poles to a double poplar (down) in a hollow; thence N. 32½ deg. E. 78 poles to two black oaks, N. W. corner to survey 14304; thence with one line thereof N. 54 deg. E. 38 poles to a stake in the forks of Dry Run in place of beech and ash (gone), N. E. corner to said survey

and corner to lot No. 100; thence with one line of No. 100
3 N. 2 deg. 50′ W. 80 poles to a stake in place of a red oak west corner to survey 15587; thence with one line thereof N. 16 deg. E. 53 poles to an elm and white walnut at foot of hill corner to surveys Nos. 13117 and 14886; thence with lines of 14886 N. 41 deg. W. 97 poles to a spruce pine, chestnut oak, and black oak; N. 71 deg. W. 28 poles to a stake in place of two white oaks (gone); thence N. 46 deg. W. 15½ poles to two white oaks, corner to survey No. 14986; thence with several lines thereof S. 48½ deg. west 14 poles to a poplar and 3 white oaks; thence N. 41 deg. W. 51½ poles to a red oak; thence N. 32½ deg. W. 62½ poles to a double lynn; thence north 39¾ deg. west 48 poles to a hickory and black oak; thence north 27 deg. west 66½ poles to a black gum in a field; thence north 33 deg. west 40 poles to a poplar and maple in a field corner to same and southeast corner to survey No. 15889; thence with same north 89 deg. 15′ west 214 poles to a stake and black oak on the county line; thence with the county line south 3 deg. 15′ east 363 poles to a stake on point of hill on said county line and on line of survey 15290; thence with two lines thereof south 24 deg. east 27 poles to a chestnut, dogwood, and poplar east corner to said survey (15290); thence north 88 deg. west 10 poles to a stake on said line and on aforesaid county line; thence with same south 3 deg. 15′ east 191½ poles to a stake on said line and on line of survey No. 15771; thence with 3 lines thereof north 50 deg. 40′ east 57 poles to a maple in Dog Hollow; thence south 50 deg. 25′ east 50 $\frac{4}{10}$ to a hickory and maple on hillside; thence S. 38 deg. west 175 poles to white oak, corner to survey No. 15231; thence with two lines thereof south 43 deg. 15′ east 90 poles to a black oak on top of ridge; thence south 54½ deg. east 52¾ poles to a stake in line of said 15231 and corner to aforesaid 15886; thence with same north 34 deg. east 52 poles to the beginning, containing 1,682 acres, being all of lot 99 Ohio agricultural and mechanical college lands.

4 Plaintiff further says that there is situated on said tract of land extensive stone quarries which, with lands connected therewith, he leased to Caden Brothers in the month of March, 1873, for the term of twenty years, and who are now in possession of the same under said lease, and working and operating the same, employing a large number of hands in their operations in said quarries, and paying said plaintiff a royalty on all stone quarried; that said defendant has lately set up and is now setting up some claim of title to the north part of said tract of land, embracing about one thousand acres thereof and including a part of said quarries and the quarry land connected therewith, and has committed waste and trespass thereon by cutting down timber thereon, and has threatened and now threatens to continue the same, and to cut down and remove a considerable amount of timber on the premises claimed by him as aforesaid.

Said defendant has also lately interfered and is still interfering with the working and operating said above quarries by threatening to compel said Caden Brothers to cease working the same and demanding that they pay royalty on the stone quarried therein to him

instead of to said plaintiff, and has threatened and now threatens that unless the same is done to tear up the railroad constructed to said above quarries over said lands by said Caden Brothers at great expense, and is interfering with and causing trouble with the employees and hands of said Caden Brothers, and has attempted and is attempting by intimidation and threats to compel them to cease work in said quarries, claiming to be the owner thereof, and that said plaintiff and those holding under him have no title thereto or any right to the use and occupation thereof.

5 Said plaintiff further says that said defendent is wholly irresponsible and insolvent, and is a non-resident of the State of Ohio and a resident of the county of Lewis, Kentucky, and that plaintiff has not nor can he have any adequate remedy or relief at law against said waste and trespass and said acts of said defendant done and committed and threatened to be hereafter done and committed as aforesaid.

Plaintiff says that he believes that said defendant, unless restrained and enjoined by the order of this court, will commit further waste and trespass on said premises and will carry out his threats in regard to interfering with said stone quarries, and will deprive said plaintiff and those holding under him as aforesaid from the free use and occupation of said lands and quarries.

Plaintiff therefore asks that said defendant may be perpetually enjoined from committing or causing to be committed any further acts of waste or trespass on said real estate above described, or from in any manner interfering with the rights of said plaintiff or those holding under him as aforesaid to the quiet use and possession of said premises or the working and operating of said quarries; that the title to said lands may be quieted in said plaintiff and said defendant forever enjoined and restrained from setting up any claim of title thereto or from interfering with said plaintiff in the possession or control thereof, and for other proper relief in the premises.

W. A. HUTCHINS AND
MOORE & NEWMAN,
Attorneys for Plaintiff,

Answer.

Court of Common Pleas.

WILLIAM J. FLAGG, Plaintiff, *vs.* JOHN A. COAN, Defendant.

SCIOTO COUNTY, *ss:*

6 Now comes John A. Coan and, by leave of court, files this his answer to the petition of the plaintiff, and says for his first answer:

1st Answer. That he only claims that part of the premises described in the petition north of a line extending from the northwesterly corner of survey No. 14304 westwardly to the most easterly corner of survey No. 15771, and that he here disclaims all the title to that part of the premises described in said petition south of said line, and his answer herein is to be construed to apply only to the premises herein referred to.

He denies that the plaintiff has the legal title, or is the owner of, or is or was at the time of the commencement of this suit in possession of that portion of the premises described in the petition herein claimed by defendant.

He further denies that plaintiff has ever leased the land herein claimed to the Caden Brothers, or that they are in possession of the same as tenants of plaintiff.

He admits that he has notified Caden Brothers not to trespass on said tract claimed by him, but denies that he has taken any unlawful or violent means to prevent plaintiff or those claiming under him, or his agents, from trespassing on said premises. He admits that he is a resident of the sovereign State of Kentucky, but denies that he is irresponsible or insolvent.

2d answer. Defendant says that he and those under whom he claims have been in open, notorious, exclusive, and adverse possession of said premises herein claimed for a period of more than 21 years last past prior to the commencement of this action.

3d answer. Defendant says that the premises claimed by him in this action, being situate in the Virginia military district of Ohio,

7 were duly entered on the 18th of December, 1849, in the office of the surveyor and register of lands for said district in Chillicothe, Ohio, by Joseph Gordon, Sarah Ann Gordon, Margaret B. Gordon, and David F. Heaton, assignee, on a valid military warrant No. 494 (exchange).

That on the 10th day of April, A. D. 1851, said land so entered was duly surveyed by a deputy surveyor of the United States for the land district wherein said entry was situate.

That said survey was duly returned to said land office on the 23d day of December, 1851, and was then recorded in said surveyor's office of said Virginia military district, and that afterwards, on the 26th of December, A. D. 1851, the said E. P. Hendrick, surveyor for said district, duly certified said survey, being numbered (the same as said entry) 15882, to the General Land Office at Washington, D. C., for patent, and that said survey has ever since been on file in said office. Defendant avers that all such steps were taken as to make said entry and survey valid and binding upon the premises therein included, and which are the identical premises herein claimed (with others).

That afterwards David F. Heaton, one of the persons in whose name said entry and survey was made, purchased the interest of all the other persons in whose names said entry and survey was made, and received due and proper assignments and conveyance thereof.

That said purchase was consummated about the 14th day of January, 1858, and thereby the said David F. Heaton became the exclusive owner of said entry and survey.

That afterwards the said David F. Heaton, being the owner of the whole of said entry and survey, in the year 1871 sold and contracted to convey that part herein claimed to one David M. Elliott, and gave him possession thereof; that said David F. Heaton in his lifetime failed to convey said premises to the said David M. Elliott in pursuance of his obligation thereto, but that the said David

8 F. Heaton died testate on the 3d day of November, A. D. 1871, and that by the terms of his will one Leonidas C. Heaton was appointed executor thereof, and that on the 11th day of November, A. D. 1871, the will of David F. Heaton was duly admitted to probate in the probate court of Scioto county, Ohio, and that on the 11th day of November, A. D. 1871, the said Leonidas C. Heaton was, by the probate court of said Scioto county, duly qualified as such executor.

That afterwards, on the 6th day of June, A. D. 1874, the said Leonidas C. Heaton, then being executor of the last will and testament of the said David F. Heaton, and being fully authorized thereto by the terms of said will, duly conveyed the premises herein claimed to the said David M. Elliott by deed in fee-simple.

That afterwards, on the 15th day of September, A. D. 1875, the said David M. Elliott sold and conveyed said premises in fee-simple to this defendant herein, who took possession at said time, and has remained in possession thereof ever since; that during the time said entry and survey was held by the said Gordons and Heaton, and during the time said entry and survey were held by the said David F. Heaton, he, the said David F. Heaton, held open, notorious, and exclusive possession of said tract adverse to all comers, and that from the time said tract was purchased by the said David M. Elliott, in the year 1871, the said David M. Elliott remained in open, notorious, and exclusive possession of said tract herein claimed adverse to all comers until the said Elliott sold and conveyed said tract to defendant, who has been in open and notorious possession thereof ever since.

That said entry and survey and the assignment thereof are all valid, legal, and binding on said tract, and defendant is entitled to the patent and is about to apply for the same.

9 4th answer. That the only title of plaintiff to said premises is a pretended deed from the Ohio Agricultural and Mechanical College to plaintiff, which claimed title to the same tract by grant from this State; that at the time the Congress of the United States granted the unsurveyed and unsold lands in the Virginia military district in Ohio to the State of Ohio, on the 18th of February, A. D. 1871, said tract of land herein claimed by defendant had been duly entered, surveyed and appropriated under the laws of the United States by the said David F. Heaton and Gordons, as in the 3d answer herein set forth, and was not for said reasons within the terms of said grant, and the State of Ohio, and said college took no title by the terms of said grant, and that said college, the pretended grantor of plaintiff, had no title to said tract from the State of Ohio directly, and the United States mediately.

5th answer. That if the said college had any title to the said tract herein claimed by virtue of grant of the United States to the State of Ohio on the 18th of February, 1871, which the defendant denies, defendant avers that said deed and conveyance referred to in the 4th answer herein was procured from said college by the fraudulent and corrupt acts and practices of the plaintiff herein; that at the time plaintiff contracted to purchase said premises from said college,

about March, 1874, he, the said plaintiff, falsely and fraudulently pretended to the agent of said college that he, the said plaintiff, was in possession of and had an equitable title to the premises herein claimed, which could be perfected into a legal one, and that he was the owner of entries and surveys which were valid and binding covering said surveys, and that the plaintiff had made valuable and lasting improvements on said premises on the faith of his
10 alleged entries; also at the time of said alleged purchase plaintiff, well knowing that the premises herein claimed were very valuable, and contained stone quarries thereon of value of from $50,000 to $100,000, fraudulently concealed said fact from the agent of said college, and falsely and fraudulently pretended to them that the premises herein claimed were of little value, and by his false and fraudulent practices induced said college trustees to believe said tract was only worth from 80 cents to $2 per acre; that plaintiff induced the trustees of said college to believe in his pretended title as aforesaid, and to sell him said lands at private sale at $2 per acre, when in truth and in fact the said plaintiff had no shadow of a title or claim to said premises, equitable or otherwise, and was not the owner of any entries or surveys conveying any part of the premises herein claimed by defendant, and had never been in possession of any part of the premises herein claimed, and had never made any improvements thereon whatever.

That in truth and in fact said premises are very valuable, and plaintiff procured the same at a price entirely inadequate to their real value. Defendant says that said pretended conveyance, having been obtained by fraud, is void.

6th answer. That the pretended title and conveyance of the plaintiff from the Ohio Agricultural and Mechanical College is invalid and void for the following reasons: That the agents of said college, who represented the trustees thereof, fraudulently conspired and colluded with the plaintiff to give him title to said premises in violation of the trust upon which the said trustees held the same, and in disregard and defiance of the laws of Ohio; that the trustees of said college failed and neglected to divide the tract described in the petition into lots of 500 acres each.

11 That said trustees failed and neglected to have their surveyors note the character of said tract and lands and of the Waverly building stone thereon, as required by law, or to have said lands appraised; that said trustees failed to have plats of said lands made, as required by law, and no plat survey or appraisement thereof has ever been filed in the office of the auditor of State or recorded in said office; that the agents of said trustees fraudulently and corruptly connived with the plaintiff and sold said lands to him and procured said trustees to convey the same to plaintiff without reference to any appraisement thereof or the true value thereof; that the plaintiff is a resident of New York and is wholly irresponsible and insolvent.

Wherefore defendant prays that his said equitable title may be declared good, and that the same may be quieted as against the plaintiff, and that plaintiff may be perpetually enjoined from dis-

turbing the possession of defendant in said tract herein claimed by him.

That the pretended deed of said college to plaintiff for the premises herein claimed is a cloud upon the defendant's title, and defendant therefore prays that the court would adjudge said pretended conveyance invalid and void against the premises herein claimed by defendant, and that he may have such other and further relief as equity and good conscience may require

JOHN A. COAN, *Def't.*
By N. W. EVANS, *Att'y.*

12 *Reply and Demurrer.*

Court of Common Pleas.

WILLIAM J. FLAGG, Plaintiff, *vs.* JOHN A. COAN, Defendant.

SCIOTO COUNTY, *ss:*

1. The plaintiff, for his reply to the second defense of defendant, says: He denies that the defendant and those under whom he claims have been in open, notorious, exclusive, or adverse possession of said premises claimed by him in his answer for a period of more than twenty-one years last past before the commencement of this action; and even if he and they had been so in possession of said premises for more than twenty-one years, plaintiff denies that the defendant by reason thereof acquired any right or title to said premises, because he says that until February 18th, 1871, the title to said premises was and continued to be in the Government of the United States.

2. Plaintiff, for his reply to the third defense, says: He denies that the said Joseph Gordon, Sarah Ann Gordon, Margaret Gordon, and David F. Heaton ever appropriated said premises or any part of the same by a valid and legal entry and survey under any act of Congress. He denies that they ever acquired any equitable title thereto by any entry and survey, or that any entry or survey thereof was ever recognized by the Land Department of the Government of the United States as legal and sufficient to appropriate the same; on the contrary the plaintiff avers that any and every attempt of said parties to appropriate said premises by their pretended entry and survey has been denied by the proper department of the Government of the United States having the control of the Virginia military lands. He says that said pretended entry and survey have been held invalid, illegal, and fraud-

13 ulent by the proper Department of the Government of the United States for the reason that the assignment of the warrant under which said pretended entry and survey were made had not been made by the parties owning the same, and for the further reason that more than four times as much land as was called for by said warrant was embraced in said pretended entry and survey. He says further that if said survey, or a certified copy of the same, has been returned to the General Land Office, at Washington city, said department has refused to recognize the same as a valid survey, and has refused again and again to issue a patent for

the land embraced therein, or convey the same into grant. He denies that said parties named, or any one claiming under them or either of them, by assignment or otherwise, has acquired or does now hold any right or title, legal or equitable, in or to said premises, or any part of the same, under or by virtue of said pretended entry and survey. He denies that the defendant is entitled to a patent for any part of the premises in controversy, or can obtain the same.

3. For his reply to the fourth defense the plaintiff says that the land in controversy was granted by the United States to the State of Ohio by act of Congress, and by the State of Ohio was granted by act of the Legislature to the Ohio Agricultural and Mechanical College, and by said college has been conveyed by and to the plaintiff, under which he now holds his title to said property. He denies that at the time said land was so granted by the United States to the State of Ohio there had been or was any appropriation of said lands, or any part of the same, by said pretended entry and survey, or that there was any right or equity in favor of any one in respect thereto to prevent the title from passing by said grant.

4. Plaintiff demurs to the fifth answer or defense of defendant, and for cause of demurrer says that said answer does not state facts sufficient to constitute a defense to said action.

14 5. Plaintiff demurs to the sixth answer or defense of defendant, and for cause of demurrer says that said answer does not state facts sufficient to constitute a defense to said action.

MOORE & NEWMAN,
Attorneys for Plaintiff.

Demurrer.

Court of Common Pleas, Scioto County, Ohio.

WILLIAM J. FLAGG, Plaintiff, *vs.* JOHN A. COAN, Defendant.

Demurrer to reply.

Now comes the defendant and demurs to the second reply of plaintiff for the reason that the same does not state facts sufficient to constitute any defense to the matters set up by defendant in his third answer.

EVANS & LIVINGSTONE,
Att'ys for Def't.

Journal Entries.

THE STATE OF OHIO, }
Scioto County, } *ss:*

I, A. B. Cole, clerk of the district court within and for the county of Scioto and State of Ohio, do hereby certify that the following docket and journal entries are truly taken and copied from the docket and journal of said court in the case of Wm. J. Flagg *vs.* John A. Coan:

1877, January 2d.—Transcript of docket and journal entries from common pleas filed. 1877, April term (April 20).—Continued. 1877, December term (Dec. 15).—This cause came on to be heard on the de-

murrers by plaintiff to the 5th and 6th answers of the defendant, and was argued by counsel, on consideration of which the court sustains the said demurrers; to which ruling of the court defendant excepted.

15 Thereupon this cause came on to be heard on the issues joined between the parties and was submitted to the court, and the court having heard the evidence introduced by the parties and the arguments of counsel, and being fully advised in the premises, the court finds the issues joined in favor of plaintiff, and that the facts set up in plaintiff's petition are true and that the facts set up in defendant's answer are not true, and that plaintiff is entitled to the relief prayed for by him.

And thereupon the defendant filed his motion for a rehearing and a new trial of this cause, for reasons stated in said motion, and this cause came on to be heard upon said motion for a rehearing and new trial of this cause, on consideration whereof the court is of opinion that said motion is not well taken and overrules the same; to which ruling of the court in overruling said motion for a rehearing and for a new trial defendant, by his counsel, excepted, and presented his bill of exceptions taken on the trial of this cause, and to the overruling of his motion for a rehearing and new trial, and asked the allowance of the same; and thereupon on his motion said bill of exceptions is allowed, signed, and sealed by the court and ordered to be placed on file and made a part of the record in this case.

Thereupon it is considered and adjudged by the court that the said defendant be, and he is hereby, perpetually restrained from setting up any claim, right or title in or to the real estate mentioned in said petition, and from any interference with the possession or occupancy thereof by plaintiff. It is further considered and ordered by the court that the plaintiff be quieted and confirmed in his title to said premises and his right to occupy, use, and hold the same.

And it is further ordered that the defendant pay the costs of this suit, for which execution may issue.

16 And it is further ordered that a special mandate be sent to the court of common pleas to carry this judgment into execution.

Bill of Exceptions.

District Court, Scioto County, Ohio.

WILLIAM J. FLAGG, Plaintiff, *vs.* JOHN A. COAN, Defendant.

Be it remembered that on the trial of this cause in the district court of Scioto county, Ohio, at its December term, A. D. 1877, wherein William J. Flagg was plaintiff and John A. Coan was defendant, the plaintiff, to maintain the issue on his part, offered his testimony, as follows:

A deed from the trustees of the Ohio Agricultural and Mechanical College to the plaintiff, made June 10th, 1875.

To the introduction of which deed defendant, by his counsel, ob-

jected on the ground that said deed was incompetent without previous proof that that grantor in said deed, previous to the execution of the same, had complied with the requirements of the act of the Legislature of the State of Ohio, passed April 3, 1873, accepting the cession of Virginia military lands from the United States, and because said deed conveyed no title; and thereupon the court overruled said objection of defendant and admitted said deed in evidence, to which ruling of the court defendant excepted and prayed his exception be noted, which was done. The following is a copy of said deed so offered, to wit:

Deed from Trustees of O. A. & M. College to Wm. J. Flagg.

Know all men by these presents that we, the board of trustees of the Ohio Agricultural and Mechanical College, in
17 pursuance of an act of the Congress of the United States, approved February, A. D. 1871, entitled "An act to cede to the State of Ohio the unsold lands in the Virginia military district in said State," and also in pursuance of an act of the General Assembly of the State of Ohio, which was passed and which took effect on April 3, A. D. 1873, and which is entitled "An act accepting the act of Congress of the United States, approved February 18, 1871, ceding to the State of Ohio certain lands in the Virginia military district, and to provide for the disposal of same, and to repeal certain acts hereinafter mentioned," and in consideration of the sum of three thousand three hundred and ninety-eight dollars in hand paid by William J. Flagg, of the city and State of New York, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the said William J. Flagg, and unto his heirs and assgns forever, the following premises, situate in the county of Scioto, in the State of Ohio, and in the military district aforesaid, and bounded as follows: Beginning at three white oaks on the top of a ridge near a fence, corner to survey No. 15886 and southwesterly corner to survey No. 15499; thence with three lines of said survey No. 15499 north 26 deg. west 38 poles to a stake on an eastern hillside a few poles from the top in the place of three hickories (gone); thence north 21 deg. east 56 poles, crossing ravines at 13 and 24 poles and top of ridge at 28 poles, a branch at 48 poles to a stake on southerly hillside in place of a white oak (gone); thence south 64 deg. east 82½ poles along the hillside, crossing point of a hill and down a steep hill to two white oaks on the bench of the hill northwesterly corner to said survey No. 15499 and corner to aforesaid survey No. 15886; thence with several lines thereof north 16 deg. west 41 poles along on a bench of the hill to a beech and hickory on the south side of a branch; thence
18 north 22 deg. east 57½ poles, crossing a branch at 5 poles to a leaning hickory standing near and above bank of an old quarry on Gas Hollow; thence north 4 deg. 30′ west 29½ poles to a large poplar on a point at 1½ poles south of a small drain; thence north 59 deg. east 16 poles, crossing a drain at 2½ poles to a large white oak (down) in the dump of old quarry on west side of Gas Hollow opposite the mouth of a drain, two sycamores and a poplar newly marked; thence south 33 deg. east 36 poles, crossing Gas Hollow at

8 poles to a stake in place of a white oak and poplar (gone); thence south 13 deg. west 57½ poles, crossing a small branch at 5½ poles to a white oak on the bench of the hill (oak down, but marks to be seen); thence south 5 deg. 45′ east 54 poles along bench of the hill to a chestnut oak and black oak; thence south 40 deg. 30′ east 41½ poles, crossing an old quarry road at 16 and 34 poles and a branch at 26 to two chestnut oaks on hillside (one cut down), a corner to said survey No. 15886 and corner to lot No. 102, heretofore known as the D. F. Heaton survey, No. 15882, of 100 acres; thence with one line thereof south 76 deg. 45′ E. 56 poles to a stone in a drain in place of three red buds 8 poles below Deer Lick a maple 3 in. in diameter bears south 15 deg. 30′ east 19 links, a poplar 16 in. in diameter bears north 7 deg. east 50 links, corner to said lot and northwest corner to survey No. 14305; thence with one line thereof north 51 deg. east 21 poles to two small hickories and a dogwood on the west bank of the main branch of Middle Dry run, N. E. corner to said survey No. 14305 and corner to lot No. 101, part of said D. F. Heaton's survey No. 15882 aforesaid; thence with one line of said lot No. 101 north 40 deg. 30′ east 153 poles, crossing Dry run at the start to a stake in the line of survey No. 15886 on Upper Dry run; said stake is north 41 deg. 10′ west 2 poles from a black oak and poplar corner to said survey; thence with lines of said survey No. 15886 north 41 deg. 10′ west 48¾ poles, cross-
19 ing a deep ravine at 8 poles and a branch at 42 to a black gum on the side of a point 2 poles north of said branch; thence N. 8 deg. west $16\frac{40}{100}$ poles to a double poplar in a small run, one fork of tree down; thence north 14 deg. west 58½ poles up said run and crossing ridge to a stake, double lynn 15 inch. in diameter bears south 45 deg. east 38 links, a lynn 10 inches in diameter bears south 81 deg. 62′ east 36 links, stake in place of a double poplar (down); thence north 32 deg. 30′ east 78 poles, crossing a branch at 47 to two black oaks on top of ridge N. E. corner to said survey No. 15886 and N. W. corner to survey No. 14304; thence with one line of said survey No. 14304 north 54 deg. east 38 poles, crossing a branch of Dry run at 37 to a stake, a beech 10 inch. in diameter bears south 9 deg. 30′ east 68 links, a poplar 4 inch. in diameter bears south 68 deg. 30′ east 4 links, stake in the forks of upper dry run in place of a beech and ash (cut down), N. E. corner to said survey No. 14304 and corner to lot No. 100, part of D. F. Heaton's survey No. 15882 aforesaid; thence with one line of said lot No. 100 north 2 deg. 50′ west 80 poles to a stake near the top of a ridge in place of a red oak (gone), a white oak 13 inch. in diameter bears south 59 deg. west 40 links, a black oak 4 inch. diameter bears north 3 deg, 30′ east 18 links west corner to survey No. 15887; thence with one line thereof north 16 deg. east 53 poles, crossing top of ridge at 7, and down a steep hill to an elm and walnut at the foot of the hill south side of Upper Twin creek, corner to surveys Nos. 13117 and 14886; thence in the lines of survey No. 14886 north 41 deg. west 97 poles, passing through a field and crossing a branch to a large spruce-pine, chestnut oak, and black oak (both oaks down) on the south side of Upper Twin creek; thence north 71 deg. west 28 poles up the creek to a stake in line of two white oaks (gone); thence north 46

deg. W. 15½ poles to two white oaks (one down, the other dead)
20 on the south bank of the creek, corner to surveys Nos. 14886 & 14986; thence with several lines of 14986 south 48 deg. 30′ west 14 poles up a hill to a poplar and three white oaks (one white oak and poplar down) on a bench of the hill; thence 41 deg. west 51½ poles, crossing Elm Hollow to a stake in place of a (down) mulberry 4 inch. diameter bears north 38 deg. east 11 links, a poplar 3 inch. diameter bears south 57 deg. west 5 links; thence north 32 deg. 30′ west 62¾ poles to a double lynn, a black oak 6 inch. diameter bears south 39 deg. east 27 links to a white walnut 10 inch. diameter bears south 29 deg. east 27 links; thence north 39 deg. 45′ west 48 poles, crossing a branch at 31 to a hickory and black oak, a blackoak 15 in. in diameter bears N. 19 deg. 30′ west 24 links; thence north 27 deg. west 66½ poles, crossing a branch at 19½ to a black gum in a field; thence north 33 deg. west 40 poles to a poplar and maple in a field N. W. corner to said survey No. 14986 and S. W. corner to survey No. 15889; thence with one line of said survey No. 15889 north 89 deg. 15′ west 214 poles, crossing divide between Upper and Lower Twin creeks at 114 to a stake and large black oak on a southern hillside S. W. corner to said survey and in the line between the counties of Adams and Scioto; thence with said line south 3 deg. east 363 poles, crossing branches of Vastines run at 17 and 123 and passing N. W. corner of survey No. 15731 at 56 to a stake in said line and the line of survey No. 15290; thence with two lines thereof south 14 deg. east 27 poles to a chestnut, dogwood, and poplar on the south bank of a branch 4 poles below the fork of said branch; thence north 88 deg. west 10 poles to a stake on a bench of the hill near a dogwood and in the county line aforesaid; thence with the county line again S. 3 deg. 15′ east 191½ poles, crossing several branches to a stake on the east bank of a ravine in the county line and in the N. W. line of survey No. 15771; thence with three lines thereof
21 north 50 deg. 40′ east 57 poles, crossing railroad at 41½ to a maple in the forks of Dog Hollow; thence south 50 deg. 25′ east 47 $\frac{40}{100}$ poles crossing, Dog Hollow to a stake on hillside in place of a maple and hickory (down); thence south 37 deg. west 175 poles to a stake in place of a white oak (down) corner to survey No. 15231; thence with two lines thereof south 43 deg. 15′ east 91 poles, crossing two branches to a stake in place of a black oak (down); thence south 54 deg. 30′ east 52¾ poles to a stake on the upper side of the road leading from Buena Vista to said Flagg's vineyard on the hill, a corner to aforesaid survey No. 15886; thence with one line thereof north 34 deg. east 52 poles, crossing said road twice and through the corner of a field to the beginning, containing sixteen hundred and eighty-two acres (1,682 acres), be the same more or less, being all of Ohio Agricultural and Mechanical College lot No. 96, and including all the tract heretofore known as the Gordon & Heaton survey, No. 15882, of 400 acres; also a small triangle lying north of survey No. 15771, east of said county line and south of said survey No. 15882.

Also all of lot 102, part of the tract as designated on the plats

heretofore known as the D. F. Heaton survey, No. 15882, of 100 acres, containing $54\frac{30}{100}$ acres.

Also lot No. 101, same survey as above, and containing $71\frac{31}{100}$ acres, more or less. Also lot No. 100, same as above, containing $314\frac{93}{100}$ acres, more or less. All the foregoing-described tracts are situate in Nile township, Scioto county, Ohio, and on the waters of Upper and Lower Twin creeks.

And all the estate, title, and interest of the said Ohio Agricultural and Mechanical College, either in law or equity, in and to the said premises, together with all the privileges and appurtenances
22 to the same belonging, and all the rents, issues, and profits there; to have and to hold the same to the only proper use of the said William J. Flagg, his heirs and assigns, forever; and the said Ohio Agricultural and Mechanical College doth hereby covenant with the said William J. Flagg, his heirs and assigns, that it is the true and lawful owner of the said premises, and has full power to convey the same; that the title so conveyed is clear, free, and unincumbered; and, further, that it will warrant and defend the same against all claim or claims of all persons whomsoever; to have and to hold said premises, with the appurtenances, unto the said William J. Flagg, his heirs and assigns, forever.

In testimony whereof the said board of trustees of the Ohio Agricultural and Mechanical College have caused their corporate seal to be affixed hereto and these presents to be subscribed by the president of the board of said trustees.

[SEAL.] RALPH LEETE, *President.*

Executed in the presence of—
CHAS. A. BARTON.
C. McFARLAND.

THE STATE OF OHIO, } ss:
Scioto County, }

Acknowledged in the usual form on the 10th day of June, A. D. 1875, before H. C. Turley, N. P., Scioto county. Recorded July 22, A. D. 1875.

The foregoing deed will be found in the 24th vol. of record of deeds, recorder's office, Scioto county, Ohio.

It is agreed by both parties that said deed was legally, duly, and formally executed, and sufficient to convey any title to the premises therein described which the said college had at the time of the conveyance.

Thereupon the plaintiff offered in evidence a certain title bond, or rather a certified copy thereof, from David F. Heaton
23 to John A. Coan, the defendant, signed and executed February 14, 1854, on which were the following assignments: 15th of February, 1854, John A. Coan an undivided one-half interest to J. M. Smith; May 10, 1854, J. M. Smith his interest to William J. Flagg, plaintiff herein; May 10, 1854, J. A. Coan, defendant herein to William J. Flagg, plaintiff, herein; August 2, 1854, William J. Flagg, plaintiff herein, to Nicholas Longworth.

Thereupon defendant objected to the introduction of said title

bond and the assignments thereof in evidence as incompetent, which objection the court overruled, and permitted said bond and the assignments thereof to go in evidence; to which ruling of the court defendant, by his counsel, excepted, and prayed his exception be noted, which was done.

The following is a copy of said title bond, with the assignments thereof:

Title Bond. David F. Heaton to John A. Coan.

Know all men by these presents that I, David F. Heaton, have this day bargained and sold unto John A. Coan one hundred acres of land for and in consideration of one hundred and fifty dollars, payable as follows, to wit: fifty dollars in hand, fifty dollars in six months, and fifty dollars in one year, with interest from date; and if not paid when due, then in that case to draw interest at the rate of ten per cent. per annum; being part of survey No. 15882 on the waters of Lower Twin, in two tracts of fifty acres each, the first beginning at a stake in a line of George Crawford's survey No. 15221, 10 poles south 45 deg. east from a white oak corner to said survey, and most southerly corner to the McCall's survey No. 15771, now owned by said Coan; thence in a northeasterly direction
24 so far that a line parallel with his upper back line will include the quantity; the other tract beginning at a C. O. and B. O. corner to A. D. Kendrick's survey No. 15886; thence in a northerly direction to a white oak and poplar corner to said survey; thence north 12 deg. east 80 poles; thence north 78 deg. west 50 P.; thence south 0 deg. west 220 poles to a white oak corner to said survey; thence with several lines and corners of said survey to the beginning; said tracts to be hereafter surveyed and the true courses and distances given and liberal allowance given for hilly parts; and should the said Coan wish to include more land he shall have the privilege to include the same in said tracts, or either of them, and to alter the courses and distances as may become necessary. Now know ye that so soon as the said Coan shall pay or cause to be paid to the said David F. Heaton, his heirs or assigns, the said several sums of money before mentioned, then he, the said Heaton, binds himself, his heirs and assigns, in the penal sum of three hundred dollars to make, or cause to be made, to the said Coan, his heirs or assigns, a good and sufficient deed of conveyance for the beforementioned premises.

In witness whereof I have hereunto set my hand and seal this 14th February, 1854.

D. F. HEATON. [SEAL.]

Attest: J. H. BAIRD.

For and in consideration of the sum of seventy-five dollars in hand paid by J. M. Smith I sell, convey, and assign the undivided one-half of the within bond to the said Joseph M. Smith, of Buena Vista, Scioto county, Ohio.

Witness my hand this 15th day of February, 1854.

J. A. COAN.

J. H. BAIRD.

BUENA VISTA, *May* 10, 1854.

For the consideration of seven hundred dollars I hereby assign and convey to William J. Flagg all my right and interest of every kind acquired by virtue of the foregoing obligations of D. F. Heaton to John A. Coan, and of said Coan to me. Also, I assign to said Flagg all my improvements of every kind made on said premises in said Heaton's obligations named and the road thereto; also, the crane on said premises and the crane irons thereto.

J. M. SMITH.

Attest: J. A. COAN.

BUENA VISTA, *May* 10, 1854.

For the consideration of seventy-five dollars I hereby assign to William J. Flagg all my interest, claim, and demand acquired by virtue of the foregoing obligation of D. F. Heaton to me.

J. A. COAN.

Attest: J. M. SMITH.

CINCINNATI, *August* 2, 1854.

For the consideration of one dollar I hereby convey to Nicholas Longworth the obligation foregoing and all my right and title under it.

WM. J. FLAGG.

Received and recorded February 20, A. D. 1873.

PORTSMOUTH, O., *April* 18, 1877.

I hereby certify the within to be a true copy of the original title bond as recorded in Scioto county records, vol. 2, pages 126 and 127, record of deeds.

WM. H. WILLIAMS,
Recorder S. C., O.

It was agreed by the parties that a copy of said bond, with the assignments thereof, certified by the recorder of Scioto county, Ohio, should be used in evidence in lieu of the original, and proof of the execution of said bond was admitted.

Thereupon the plaintiff offered in evidence a certain deed from David F. Heaton and wife, Mira S. Heaton, to Nicholas Longworth, dated January 18, 1858; to the introduction of which evidence defendant, by his counsel, objected, and thereupon the court overruled said objection and permitted said deed to go in evidence; to which ruling of the court defendant, by his counsel, excepted and prayed that his exception be noted, which was done.

The following is a true copy of said deed offered in evidence, which copy it was agreed by the parties should be used in evidence, and the execution of the deed was admitted.

Deed.

Know all men by these presents that we, David F. Heaton and Mira S. Heaton, of the county of Pike, State of Ohio, for and in consideration of the sum of eight hundred dollars to us in hand

paid by Nicholas Longworth, of the city of Cincinnati, same State, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, convey, and confirm to the said Nicholas Longworth, his heirs and assigns, forever, the following-described real estate, situate, lying, and being in the county of Scioto, Ohio—that is to say: Beginning at a stake where once stood a hickory, white oak, and black oak in the back line of Obannon, Graham, and Massie's survey No-. 2459 and 2558, southwesterly corner to D. McCall's survey No. 13118; thence with two lines thereof north 19 west 50 poles to a chestnut oak and pine, northwesterly corner to said survey; thence north 71 east 35 poles to an elm, black oak, and hickory in said line and top of a point corner to said McCall's survey No. 14303; thence with several lines and corners thereof north 41 west 94 poles to a chestnut oak and black oak on top of ridge, north 18 east 53 poles to a black oak and hickory on top of ridge, north 57 east 70 poles to a gum and two hickories on point of a hill corner to A. D. Kendricks' survey No. 15886; thence with several lines and corners thereof north 70 west 12 poles to a white oak, north 61 west 34 poles to a poplar and black oak,
27 north 42 west 50 poles to a gum, north 9½ west 12 poles to a poplar, north 15 west 40 poles to a double poplar on a branch, north 57 east 60 poles to three black oaks northeasterly corner to same and northwesterly corner to said McCall's survey No. 14304; thence west 330 poles to a hickory and hornbeam on side of a hill most easterly corner to Wm. McCall's survey No. 15771; thence with a line thereof south 35 deg. W. 150 P. to a W. oak corner to same and corner to George Crawford's survey No. 15231; thence with two lines thereof south 45 east 84 poles to a black oak, south 54 east 115 poles to a stake in said line most westerly corner to A. D. Kendrick's survey No. 15886; thence with a line thereof N. 33 east 18 poles to a white oak corner to survey No. 15499; thence with several lines and corners thereof north 45 west 20 poles to a white oak, north 15 east 30 poles to a black oak, south 75 east 40 poles to a white oak corner to same and corner to A. D. Kendrick's aforesaid survey No. 15886; thence with several lines and corners thereof north 17 west 30 poles to a black oak and hickory, north 21 east 35 poles to a hickory, north 6 west 24 poles to a poplar, south 12 west 35 poles to a white oak, south 7 east 30 poles to a chestnut oak and red oak, south 46 east 25 poles to two chestnut oaks, south 15 east 20 poles to a chestnut oak, south 5 east 20 poles to two chestnut oaks, south 41½ east 78 poles to a chestnut oak, south 36 east 12 poles to two red oaks, north 56½ east 12 poles to a poplar, south 56½ east 20 poles to two ashes and a dogwood corner to same and corner to said McCall's survey No. 13736; thence with two lines thereof north 20 west 40 poles to a poplar, north 57 east 16 poles to a poplar and dogwood southwest corner to said McCall's survey No. 14305; thence with several lines thereof north 40 west 88 poles to two red oaks and a beech, north 50 east 17 poles to a hickory and dog-
28 wood, south 45 east 92 poles to a poplar, beech, and samwood, south 57 west 7 poles to two beeches and white walnut northeasterly corner to said McCall's survey No. 13736; thence with two

lines thereof south 41 east 30 poles to an elm; thence south 59 east 52 poles to the beginning, containing six hundred acres, more or less, being part of survey No. 15882, on the waters of Lower Twin; to have and to hold the same, together with all the privileges and appurtenances to the same belonging or in anywise appertaining, to the only proper use, benefit, and behoof of *the* Nicholas Longworth, his heirs and assigns, forever. And the said David F. Heaton, for himself, his heirs and assigns, doth hereby covenant to and with the said Nicholas Longworth, his heirs and assigns, that he is lawfully seized and possessed of the said premises, and that the same is free, clear, and unincumbered, and that he will warrant and defend the same against all claims whatsoever.

In witness whereof the said David F. Heaton, together with the said Mira S. Heaton, his wife, who hereby relinquishes all her right of dower in said premises, hereunto set their hands and seals — 18th day of January, 1858.

D. F. HEATON. [SEAL.]
MIRA S. HEATON. [SEAL.]

Signed, sealed, and delivered in the presence of us—
L. C. HEATON.
JOHN DANIELS.

STATE OF OHIO, } ss:
Pike County, }

Be it remembered that on this — day of January, 1858, personally appeared before me, the subscriber, a justice of the peace in and for said county, David F. Heaton and Mira S. Heaton, his wife, the grantors in above deed of conveyance, and acknowledged the signing and sealing the same to be their voluntary act and deed for the uses and purposes therein mentioned. And the said Mira, being examined by me separate and apart from her said husband,
29 and the contents of said deed being by me fully explained and made known to her as the statute directs, declared that she did voluntarily, and of her own free will and accord, sign, seal, and acknowledge the same, and that she is still satisfied therewith.

In testimony whereof I have hereunto subscribed my name officially the day and year before written.

JOHN DANIELS, *J. P.*

Received and recorded February 3, 1858.

STATE OF OHIO, } ss:
Scioto County, }

I, Isaac F. Mead, recorder of said county, do hereby certify that the foregoing is a true copy of the original deed as recorded in my office.

In witness whereof I have hereunto subscribed my name and affixed my official seal this 16th day of November, A. D. 1870.

ISAAC F. MEAD,
Recorder, S. C., O.

The plaintiff then offered in evidence item 12 of the will and item 2 of the first codicil of the will of Nicholas Longworth, late of Hamilton county, Ohio, deceased, which will was probated in the probate court of Hamilton county, Ohio, February 17, 1863.

Defendants objected to the introduction of said will, or to the items thereof, in evidence as incompetent, which objection the court overruled, and here admitted said will, or the parts thereof, to go in evidence; to which ruling of said court in admitting said evidence defendant excepted, and prayed his exception be noted, which was done.

The following is a true copy of so much of said will and the probate thereof as was admitted in evidence, to wit:

Will of Nicholas Longworth, Dec'd.

Which said twelfth item reads as follows, and of which the following is a copy:

30 Item twelfth. I do hereby will and direct, after all my just debts are paid and settled, and after the legacies in items fifth, sixth, and seventh of this my last will and testament are paid, that all the rest, residue, and remainder of my estate, real and personal, in possession or in action, at the time of my death, together with the lot of ground at the corner of Pike and Third streets, *at* the city of Cincinnati, Ohio, with the improvements thereon, conveyed by me to my daughter, Catharine L. Anderson, and the tracts of land near the city of Cincinnati, aforesaid, with the improvements thereon, conveyed by myself and others to my son, Joseph Longworth, and paid for by me, containing about one hundred acres, and occupied by him, and not needed to support and feed the provisions of this my will in the second, third, fourth, and first items thereof, be divided into twelve equal parts, according to the then cash value thereof, as near as may be, by three or more competent and disinterested men, selected for that purpose by my executors, with the consent of my three living children; and I do hereby will, give, and bequeath to my son, Joseph Longworth, and his heirs, three of said parts, and in which shall be included the aforesaid tracts of land conveyed to him as aforesaid by myself and others, and occupied by him, containing about one hundred acres; and also the house and lot of ground on Pike street, above devised, to his mother, but subject to her life estate therein. And I do hereby will, give, and bequeath to my daughter, Catharine L. Anderson, and her heirs, six of said parts, and in which shall be included the aforesaid lot of ground on the corner of Pike and Third streets, in the city of Cincinnati, Ohio, conveyed by me to her, as aforesaid, as well as the lot of ground lying between it and the above-described lot of ground fronting on Pike street, devised to her mother for life. And I do hereby will, give, and bequeath
31 to my grandson, John L. Stetimins, and his heirs, one of said parts, in addition to what I have in the eleventh item of this my will devised to him and his heirs; and I do hereby will, give, and bequeath to my son, Joseph Longworth, and son-in-law, Larz

Anderson, and to the survivor of them, and the heirs of such survivor, the remaining two parts thereof, and in which shall be included one thousand acres of land to be selected by my daughter, Eliza L. Flagg, from my lands in the counties of Adams and Scioto, in the State of Ohio, in one tract; to have and to hold the same, nevertheless, in trust for the following uses and purposes—that is to say, from the income thereof to pay all taxes, charges, liens, and assessments thereon during the continuance of the said trust—to manage farm, sell, convey, lease, and improve the same, and, in case of sale and conveyance, to reinvest the proceeds in their name with the right of survivorship, as aforesaid, in trust for the purposes herein directed, so as to make the same productive, by and with the sole advice and consent of my said daughter, Eliza L. Flagg, and from the net proceeds thereof to pay to the sole use and benefit of my said daughter, Eliza L. Flagg, during her natural life, the yearly sum of five thousand dollars in monthly or quarterly installments, or otherwise as she may desire; and also to make such reasonable improvements on the said one-thousand-acre tract of land as she may desire, in case she should reside thereon, and to permit and allow her to occupy the same or any part thereof at such reasonable yearly rent or charge as may be just and proper, to be deducted from said yearly allowance to her of five thousand dollars, as aforesaid; and in case her husband, William J. Flagg, survives her, to pay to him from the said net proceeds thereof, to his sole and only use and benefit personally, during his natural life, the yearly sum of
32 twenty-five hundred dollars in monthly installments, or otherwise as he may desire. This provision is entirely personal, and to stop, if by himself or by aperture of law it is diverted or attempted to be diverted, directly or indirectly, for his personal use and control, at any time or for any period; and in case my said daughter, Eliza L. Flagg, should die leaving issue of her body surviving her, then to convey to the said issue, in fee-simple, the residue and remainder of the said two parts, with the accumulations thereon, subject to the said annuity for the said William J. Flagg surviving her; and in case my said daughter, Eliza L. Flagg, should die without leaving issue of her body surviving, then it is my will that four-eighths of the said residue and remainder of the said two-twelfth parts, subject to four-eighths of the annuity of the said Wm. J. Flagg surviving her as aforesaid, with the accumulations thereon, be conveyed to my said son, Joseph Longworth, and his heirs; and that three-eighths of the said residue and remainder of the said two-twelfth parts, subject to three-eighths of the annuity of the said Wm. J. Flagg surviving her as aforesaid, with the accumulation thereon, be conveyed to my said daughter, Catharine L. Anderson, and her heirs; and one-eighth of the said residue and remainder of the said two-twelfth parts, subject to one-eighth of the annuity of the said Wm. J. Flagg surviving her as aforesaid, with the accumulations thereon, be conveyed to my said grandson, John L. Steltmins, and his heirs, and should my son, Joseph Longworth, die before me that it is my will that his heirs-at-law take under this my last will and testament in his place and stead, and as he would have

taken under it had he survived me, but subject to an annuity of three thouand dollars to his wife surviving him, to be paid quarterly to her therefrom, during her natural life. And should my grandson, John L. Steltmins, die before me then it is my will that his heirs-at law, of my blood, take
33 under this my last will and testament in his place and stead, and as he would have taken had he survived me, but subject to an annuity of two thousand dollars to his wife surviving him, to be paid quarterly to her therefrom during her natural life. And should my daughter, Catharine L. Anderson, die before me, then it is my will that her heirs-at-law take under this my last will and testament, and as she would have taken had she survived me, but subject to the control and management of her husband, Larz Anderson, surviving her, at discretion, for the use and benefit of himself and children, her heirs-at-law, during his natural life, as he thinks best. And should my daughter, Eliza L. Flagg, die before me leaving issue of her body surviving me, then it is my will that such issue take under this my last will and testament in her place and stead the said two-twelfths parts devised in trust, as aforesaid, for her use as aforesaid, but subject to the annuity aforesaid in favor of the said Wm. J. Flagg, her husband, if he survives as hereinbefore provided, but if she leaves no such issue, then my son, Joseph Longworth, my grandson, John L. Steltmins, and my daughter, Catharine L. Anderson, and their heirs, shall take under this my last will and testament as they would have taken in the like event, subject to the said annuity of the said Wm. J. Flagg, had my said daughter Eliza L. Flagg survived me.

And which said second (2d) item of said first codicil is as follows, to wit:

Item second. I do hereby will, devise, and direct that my daughter, Eliza L. Flagg, during her natural life, shall have the free use, occupancy, and control of the said lands above named and known as Buckhorn, according to her own will and pleasure, by herself and tenants, as her own, without waste, rent, or charge in any way,
34 with full power to dispose of the same, or any part or parts thereof, by her last will and testament, in writing, at her pleasure, and the same, or any part or parts thereof, to vest and pass at law and in equity as she may by her said last will and testament direct, without further or other grant or assurance whatever.

It was agreed between the parties that said will was duly probated, and all objection was waived to the offering said item 12th and the 2d item of the first codicil separately from the entire will.

The plaintiff, WILLIAM J. FLAGG, being offered as a witness on his own behalf, testified as follows:

I first knew the lands in controversy in 1853 and in 1854, when living in Cincinnati. Coan was then working in Gas Hollow quarrying stone, and sold us stone delivered from my own land at the river bank. Coan was then operating quarrying in Gas Hollow and also on the land embraced in the title bond from Heaton to Coan.

I obtained the deed from Heaton and wife to Longworth. The north part was not then occupied, and none was occupied then except what the parties were quarrying on. My attention was first called to the north boundary of the land in the deed from Heaton to Longworth, in order to plant a peach orchard on our land embraced in said deed; this was soon after we bought it. John H. Baird, a surveyor, now dead, showed me where the corner was. I had an interview with Major D. F. Heaton in Portsmouth about this time, in which I asked him to let us have a larger tract; he showed me a plat of the land at that time, in which the corners were due east and west on the northern boundary; he said the line of the northern boundary of the tract sold Longworth would run north of Dog Hollow shown in Gregory's plat, and would give me a deed to that line east and west.

35 The title bond was given in 1854, and the deed in 1858. After purchase I took possession of this land to said east and west lines. I sold timber, tan-bark, locust posts, and hoop-poles to the east and west lines. Half the stone lies between the said east and west line on Gregory's plat and the lines from 3 black oaks S. 73 deg. 25′ west to hickory and hornbeam; thence N. W. 43 poles to maple and pile of stone, and then southwest 73 poles to Adams county line, which will hereafter be designated as triangle in dispute. No person ever attempted to interfere with me south of the east and west line. I moved to Buckhorn, near Buena Vista, in 1854, and left there in 1869. I leased the stone quarries on our lands to John M. Mueller, who occupied 5 years, from 1866 to 1871; did not lease quarries for a year and then leased them to the Cadens. James W. Jarvis was my agent during the year the quarries were not leased; M. G. Nichols was my agent while I was in Europe in 1666 & 1868. The first time I heard of a claim south of the east and west red line was about the time I purchased of the Agricultural College. I claimed the land when I purchased of Heaton. I asked him repeatedly for a patent. He promised to obtain it, but failed to do so. After his death I applied for a patent, but failed to get it, and then I bought of the college. After I bought of the college I first heard of the defendant Coan's claim, about a month or so before suit — brought. Cadens then held possession under me. I had never before heard of Coan's claims, but had heard that D. M. Elliott claimed the north portion of the tract under purchase from D. F. Heaton. I got the old plats made by Major Heaton from the office of the Agricultural College made by Major Heaton. This plat I had at the former trial of this case, but have lost it since. In that plat the northern boundary of Longworth was an east and west line. Shortly before this suit I heard of Coan cutting timber

36 south of the east and west line. I had heard that D. M. Elliott had cut timber before that time while Cadens had their lease. The conversation with Major Heaton was in 1857, about a year before his deed was made. I have seen where the county lines crosses Dog Hollow. We began operating in Dog Hollow in 1864, below county line in Adams county. We worked across the county line in 1869. I know 3 lines of survey 15771. I do not

know whether my lessees have got off survey 15771 yet—can't say. I never saw hickory and hornbeam corner to survey 15771; once found a stone pile in county line, but never at point claimed as east of the county line. The peach orchard was about 1¼ mile due north of Buckhorn, my residence, and not far from survey 15771, and is south of the line claimed by defendant, between 3 black oaks, hickory, and hornbeam. I did not file a caveat against patent before I bought of the college, but contested the title of the college. I bought D. W. Elliott's claim at one time, but a few days after I had traded he wanted to rescind, and I took my money back; this was the north end of the survey which I wanted to buy of the Elliotts. I was about treating with college, and thought I would be in a better position to treat with college if I had title to whole. I gave Elliott $200 to $300 for his claim, but he claimed he could not find his contract, and he brought me back the money in a few days. I never talked with Sam'l Cooper about the matter. I worked stone quarry in Dog Hollow across the county line while Mueller had the quarries. Nichols (M. G.) told me we had crossed the county line working up Dog Hollow in 1869. I have my doubts if my quarry men have got off Crawford's survey (15771) yet.

MAHLON G. NICHOLS, as witness for plaintiff, being duly sworn, testified as follows:

I am a surveyor; I know Gordon & Heaton's survey 15882; I was on it in the fall of 1863; went in the vicinity as an engi-
37 neer to build a railroad and inclined plane for Flagg. The railroad was built from the Ohio river to the mouth of Dog Hollow. We got timber in the vicinity where we built the inclined plane. I knew where the county line was between Adams and Scioto counties. I was in the vicinity from 1863 to 1868 or 1869. Flagg was in possession during this time to the east and west line on Gregory's plat. We got timber for plane, derrick, ties, crane, etc., out of Dog Hollow; went up to Flagg's northern boundary the east and west line; perhaps over it. I never heard any one but Flagg claim land in Dog Hollow while I was there. The quarries in Dog Hollow were open while I was there, on the left-hand side. The peach orchard was some distance south of the east and west line. I understood from the Elliotts that they had bought of Heaton the right to cut timber on the survey north of the ridge. I talked to Heaton to know if he had any stone land unsold; he said he had good stone land in Elm Hollow and in Vastine Hollow; said he had sold stone land in Dog Hollow to Flagg; Elm Hollow was over dividing ridge, and so was Vastine Hollow over ridge—one north, the other northeast of Dog Hollow. Heaton told me he had sold lower part of survey to Flagg. I have never run the lines of survey 15771.

Cross-examined:

I never saw 3 black oaks corner to survey 15882, which is on Upper Twin creek. I got timber up all branches of Dog Hollow; was never forbidden. I bought all timber south of what is called east and west line. In the last of 1868 the quarries in Dog Hollow were

in Adams Co.; they had not then reached Scioto Co. When the Elliotts were cutting timber in 1866 they infringed on Flagg's land and cut two trees; I notified them if they kept in Elm Hollow they would not infringe on Flagg. I did not know anything about the red line marked in Gregory's plat; the east line was in the
38 quarries in 1868. I surveyed some of the lines of survey 15882; began at most southern point and ran the lines bearing general course of northeast towards 3 black oaks corner.

JOSEPH M. SMITH, a witness for plaintiff, being duly sworn, testified as follows:

I am a surveyor; knew the Gordon & Heaton survey 15882; I once endeavored to run around it with the original field-notes of the survey. I made my survey in 1874, May and June, for Mr. Flagg; the real measurement overrun original calls a great deal; all the lines overrun, some more and some less; some of the lines were three times as long as the original calls. I made a calculation of the contents of the survey according to my field-notes. I made 1,702 acres and a fraction in the survey. The original survey called for 400 acres only. Before this time, in February, 1874, I made a survey of some of the lines of the survey 15882 for the Elliotts, David M. & Laban W. Mr. Bryan had been previously surveying for them on the same survey, and he called on me to complete some of his work, which, by reason of other engagements, he could not do. I was not then in the employ of Flagg, plaintiff. I ran the east and west line shown on Gregory's plat. This line, when extended west from eastern boundary, strikes the county line 22 poles north from where the county line crosses the left-hand fork of Dog Hollow, going up the hollow. There is no monument or object at the point where the east and west line as then run by me crossed the county line. There was a pile of stones where the county line crosses the left-hand fork of Dog Hollow. Treating the east and west line as the proper line between Flagg and Heaton, Flagg would have about 666 acres south of the line, the division line claimed by Coan running south about 72½ deg. west. Coan's line would give Flagg 510 $\frac{55}{100}$ acres south
39 of the line. I am familiar with the quarries in Dog Hollow. Taking Flagg's line as correct the quarries are south of it; taking Coan's line as correct the quarries are north of them. The east and west line claimed by Flagg is north of the peach orchard. I went to Buena Vista to reside in 1874—April. Cadens were then operating the quarries. I became Flagg's agent in July, 1875, and have remained in his employ since. Flagg was then in possession to east and west line. I first heard of a dispute as to the line and as to Flagg's title in the fall of 1885. Coan, defendant, then set up some claim about two weeks before this suit began. I had heard that David Elliott claimed that part of survey 15882 north of the black line claimed by Coan. This was in Feb'y, 1874, and prior to that time. About the time Coan's claim was heard of by me he began to cut timber on the land he claimed. He then resided near Vanceburg, Ky. He was there but once, going through [to] Buena Vista. He said he was going to commence work on the land, and

about that time parties under him cut timber on the land. I notified some of his men to desist cutting timber, and also sent Coan notice to that effect. This was within a short time before this suit commenced.

Cross-examined:

I ran the east and west line in my survey for the Elliotts. I ran out the distance, 330 poles, and did not reach the county line; did not afterwards run the line out to county line; I afterwards ran the lines on the west of the survey. I found a hickory and maple at the most easterly corner of Crawford's survey 15771. I found no trace of hornbeam. This was in the summer of 1875. In running the east and west line from 3 black oaks west the distance, 330 poles, runs out about 40 poles east of the county line. I ran the line marked out in Gregory's plat as from hickory and hornbean corner to survey 15771; to 3 black oaks N. W. corner to Mc-
40 Call's survey 14304. The course is north 73½ deg. east, distance 316 poles. I came out near the three black oaks. There never has been any controversy that I know of as to the lines or corners of Crawford's survey 15771; that survey is an old established one. The stone quarries are now operated a little north of the black line on Gregory's plat claimed by Coan. The maple I found with [the] hickory had old corner marks. There is no stone pile at the most northerly corner of survey 15771 near the maple, but there is one where [the] county line crosses Dog Hollow. John Sullivan found the corner marked hickory and hornbeam of survey 15771, and which I call the maple corner. The peach orchard is S. E. of this corner, and Flagg's old residence is about a mile south of the maple corner. A line according to the deed from Heaton to Longworth would be the line marked in Gregory's plat as Coan's line from 3 black oaks to hickory and hornbeam most easterly corner to survey 15771.

Re-examined:

The north corner of Crawford's survey 15771 should be in the county line. In calculating contents of survey 15882, as resurveyed by me, I included the triangular corner on east of survey between line from northwest corner to maple and pile of stone corner, line marked south 9 deg. east and the county line, the contents of which on Gregory's plat is marked $96\frac{50}{100}$ acres. I found what I recognize as east corner of Heaton's survey, a stone pile at where county line crosses Dog Hollow. This is 22 rods south of where the east and west line crosses [the] county line and considerably north of Coan's line. The course of the county line is south 3 deg. east. The outside lines of survey 15882 include several other surveys older than it. From pile of stone in county line to hickory & maple is 121
41 poles, bearing south 49 deg. 10′ east, call south 52 deg east, 45 poles. This corner corresponds with course and distance from stone pile. About the time Coan began cutting timber he said [the] stone quarries were his; saw Heaton's old plat of survey at last trial; the line on it dividing survey runs north of Coan's

line and with present east and west line. Heaton's east and west line calls for 330 poles. The black line of Coan's is 316 poles; don't know anything about the genuineness of Heaton's old plat.

Defendant objected to so much of Joseph M. Smith's testimony tending to show that the lines of survey 15882 as resurveyed by witness were longer than the lines as called for in the original survey, or that the said survey 15882 contained any larger number of acres than was called for in said original survey, which objection of defendant was overruled by the court, and said evidence admitted; to which ruling of the court defendant, by his counsel, excepted and prayed his exceptions be noted, which was done.

Capt. CHARLES A. BARTON, being first duly sworn as a witness for plaintiff, testified as follows:

Have seen Major Heaton's plat of survey 15882; know his handwriting. In his plat referred to the division line of the survey was the east and west line marked Flagg's line on Gregory's plat. The name of Flagg was written on the plat south of the line mentioned; I had charge of Maj. Heaton's papers at one time, and found the plat about two years ago; the plat was here on last trial of this cause; it was either on vellum or map paper. I am a surveyor. I am connected with Ohio Agricultural and Mechanical College. I have surveyed this survey; the lines actually run are usually double the length of lines as called for in the survey; there is a very large surplus of land in the survey; the entry calls for 400 acres, which is the original quantity.

42 Cross-examined:

I made a map of this Scioto county, O. I never estimated the number [of] acres in the survey 15882 or calculated the same from the original field-notes of survey and cannot say whether a computation from original field-notes will make the amount so calculated 400 acres or not. The outside boundaries of survey 15882 are older surveys than 15882 on every side except on the north; the survey bounding survey 15882 on the north is more recent than it, and is numbered 15889; survey 15882 includes two or three other surveys, notably two shown by the map of Scioto county and both having the same number, to wit, 15886, one calling for 180 and the other for 150 acres. These two surveys, though having a higher number than 15882, are in point of fact older surveys. I attach to this, my testimony, a copy of the map of Scioto Co., showing survey 15882 and the surveys adjacent, including the two surveys, each having the number 15886.

(For plat see original bill of exceptions.)

ADOLPH CADEN, a witness for plaintiff, being duly sworn, testified as follows:

I am one of the Caden Brothers, lessees of Wm. J. Flagg, in the Dog Hollow quarries. My brother, Gustav Caden, and myself have worked these quarries since March, 1873. Before that time they were worked by W. Lewis Caden and Wm. Caden. Flagg had land

north of the quarry, from which we got timber for railroad, etc., with Flagg's permission. When I was there in 1873 I heard no claim against Flagg's right. In the spring or fall of 1874 the Elliotts came to me and said they had a claim on the land from Major Heaton; I told them we held under Mr. Flagg. They wanted to lease lands for a quarry to me; I told them if they had a title we would talk about it, but that I thought Flagg had
43 the title. Elliott said if he had title he would talk to us before leasing. Coan came from Ky. and bought Elliott's claim to the northern part of the land for $1,500—$50 down and balance on time; Coan told me this. We were occupying at that time under Flagg and north of Dog Hollow. Coan never came to us, but sent men there to work or cut timber on the land claimed by him; he came there at one time when we were at work when I was gone; he sent me a notice I must quit or he would tear up the railroad down Dog Hollow; he then resided in Kentucky. This was about 3 weeks before this suit was brought.

Cross-examined:

We cut timber in Dog Hollow, in Scioto county. We always quarried and worked in Scioto Co. My brothers worked in Dog Hollow, in Scioto Co., in 1872. They had been working before that time in Adams Co. We cut timber on both sides of Dog Hollow under Flagg as far north as where I suppose the location of the red line to be.

HENRY KUHNS, a witness for plaintiff, being sworn and examined, testified as follows:

I have lived in Dog Hollow for 8 months last past. I worked in quarry in Dog Hollow in 1865 for Mueller and until 1870. I bossed the quarry for Mueller and he had possession during that time under Flagg. No one was then claiming against him, and we cut timber in the hollow, north of the quarries, where we pleased; no one interfered with us. The quarry was idle for one year after Mueller ceased working them; the Cadens took it. I knew the Elliotts; did not know of them getting any timber on this land.

Cross-examined:

The whole time I worked for Mueller in the quarries in Dog Hollow we were working in Adams county.

44 JOHN LARKINS, a witness for plaintiff, being first sworn, deposed as follows:

I knew Dog Hollow; have chopped timber near the heads of Dog and Gas Hollows. I cut north of where the stone quarries now are. I rafted and run timber for M. G. Nichols. He got his timber from Twin creek and up Dog Hollow.

JOSEPH BROWN, a witness for plaintiff, being sworn and examined, testified as follows:

I live in Dog Hollow about a mile and a quarter south of the

quarries; have lived there a good many years. I first knew Heaton as the owner, then Flagg, and then the Elliotts, who claimed the quarries. Flagg and his men got their timber where they wanted it. The Elliotts got their timber in Elm Hollow. Everybody used timber on the east side of the ridge. No one claimed in Dog Hollow that I know of except Flagg, until about 2 years ago, when Coan first talked to about claiming it; he said he was going to take hold of it.

Cross-examined:

The county line between Adams and Scioto counties crosses Dog Hollow about 1¼ miles from the quarries and between my house and the quarries. I know the hickory and maple corner of Crawford's survey 15771; first knew it last August, when it was pointed out to me; the hickory has fallen down.

FREDERICK WEGHORST, a witness for plaintiff, being sworn and examined, testified as follows:

I worked in the quarries up Dog Hollow in 1864 and in 1865, when Mr. Flagg opened the quarries; again I worked in the quarries for the Cadens in 1875. Flagg had control of the land up Dog Hollow; he got timber on the hills above the quarries and north of the quarries—sometimes a considerable distance north. No other parties got timber there or interfered with him. Cadens had opened the quarries in 1875, ¼ to ½ mile further up Dog Hollow—the timber was then taken off to a considerable extent. Nichols had taken off timber on hillsides, where we afterwards took out stone. Flagg took some of the timber and the Cadens some; all was done under Flagg; no one else claimed any right to take timber; Flagg got out timber ½ to ¾ of a mile north of quarry on points of the hills.

A. R. COLVIN, a witness for plaintiff, being sworn and examined, testified as follows:

I lived on Lower Twin creek in the fall of 1875; I was at that time working for the Cadens in their quarry. I saw Coan at the quarry two or three times; he looked at it and said it belonged to him and that he would sell the stone to Cadens cheaper than Flagg did and if they did not buy it of him he would stop them from working. We had then worked from the first opening of the quarry up the hollow some ½ or ¾ of a mile. We were then working in Scioto county. Considerable timber has been taken from Dog Hollow. Sam Cooper had peeled some bark under Flagg. I never knew any one to get any stone from the hollow except Flagg or some one under him. Coan said to me in Buena Vista if they bothered him he would cut the railroad in two at the county line. This was 2 or 3 weeks before this suit was commenced. He told me also that he had sent hands to cut logs and intended to build a house near the quarry. Cadens then had 15 or 20 men working for them. Coan talked this way before Cadens' hands, and made no secret of it. He claimed the lands and also gave notice to the Cadens to quit.

Thereupon the plaintiff introduced the deposition of Jos. BOLAND as evidence on his behalf, which reads as follows, to wit:

Please state your age and residence.

Ans. I am 44 years of age; reside in Nile township, Scioto Co., O.

46 2d Q. What is the state of your health?

A. I am now sick; have been sick and unable to get around but little since last October; I am confined to the house all the time and the greater part of the time to my bed.

3d Q. Are you acquainted with the parties to this suit; if so, how long have you been acquainted with them or either of them?

Ans. Yes; I am acquainted with both parties; have been acquainted with Mr. Flagg for about 15 years; have known Coan for about two years.

4th Q. Are you acquainted with the land in controversy in this suit between Flagg and Coan; if so, how long have you known it?

A. I have been acquainted with the land for about 11 years.

5th Q. Under what circumstances did you become acquainted with said land?

Ans. About eleven years ago I bought chestnut oak timber standing on this land from Flagg. Under this contract I peeled all the tanbark on the hill between Dog Hollow and Vastine Hollow, extending back to the head of each hollow. The bark I peeled was just back or north and east of the stone quarry. At that time said quarry was being operated by John M. Mueller; at present by the Cadens.

6th Q. Do you know of any one else getting bark and timber off of said land? If so, please state all you know about it.

Ans. The same year that I got bark Mahlon Nichols was getting saw logs from the same land. Nichols hauled down Dog Hollow and we used the same road.

7th Q. State whether at any other time you got bark or timber or anything else off of said land under or by permission of said Flagg.

Ans. About two or three years ago I got some hoop-poles from said land.

8th Q. Did you ever have any conversation with David M.

47 Elliott about these lands? If so, please state when and what it was.

Ans. I had conversation- with D. M. Elliott several times. The first conversation I had with him was, I think, about five or six years ago; 'twas before the death of the old man Heaton; he then told me that he had paid the old man Heaton ten dollars for the privilege of getting timber for saw-logs; he made no claim on the Lower Twin creek side of said premises. After the old man Heaton's death he told me that he give the old lady Heaton and her son one hundred dollars to make him a deed for the land.

Cross-examined by defendant's counsel:

1st Q. Are you acquainted with the corner of the survey known as the hickory and hornbeam corner?

Ans. No, sir; I don't know nothing about the corner.

2d Q. At the time you got the timber off the land was there a quarry in Dog Hollow?

Ans. Yes, sir.

3d Q. Is the quarry spoken of by you in your answer to question 5 the one that was in Dog Hollow?

Ans. Yes.

4th Q. Where was this quarry with reference to the Adams county line?

Ans. Don't know exactly where the Co. line is.

5th Q. At the time you got the timber of Flagg was the stone quarry operated in the southern part or end of Dog Hollow?

Ans. Yes; it was operated on the left-hand side as you go up the hollow.

6th Q. Was it operated nearer Buena Vista than it now is?

Ans. Yes; they go a little further from Buena Vista every year.

7th Q. Do you know where the south line of the land in controversy is located?

Ans. I don't know any line at all.

8th Q. Was there any of the timber mentioned by you in this deposition cut on the east (or right-hand side of Dog Hollow as you go up the same)?

Ans. I don't believe there was any cut as I recollect—don't believe any was cut on the right of the hollow.

48 9th Q. Did you cut any of this timber near the right side of Vastine Hollow as you go up *it* the same?

Ans. We cut in between Dog Hollow & Vastine Hollow and the heads of the runs.

10th Q. Was most of this timber cut in Adams county?

Ans. I can't tell; I suppose there was the most of it in Adams county.

11th Q. Do you know where the corner called the maple and pile of stone corner is?

Ans. No, sir; I don't.

his
JOSEPH x BOLAND.
mark.

The foregoing was all the evidence offered by the plaintiff in opening his case, and thereupon the plaintiff rested his case, and the defendant proceeded to introduce his evidence, as follows, hereto:

1st. An exemplification of Virginia land office exchange military warrant No. 494, for 500 acres, certified as a literal exemplification from the Commissioner of the General Land Office at Washington, D. C.

2nd. A literal exemplification of entry No. 15882, dated December 18, 1849, made by Joseph, Sarah Ann, and Margaret B. Gordon and Daniel F. Heaton, assignee, on the military warrant No. 494, before described, from the office of E. P. Kendrick, surveyor for the Virginia military district in the State of Ohio, and duly certified by said surveyor as such exemplification.

3d. A literal exemplification of survey No. 15882, founded on Virginia military exchange warrant No. 494, purporting to be for 400 acres of land, and made by D. F. Heaton, deputy surveyor of said district, on April 10, 1851, for Joseph Gordon, Sarah Ann and Margaret B. Gordon, heirs, and David F. Heaton, assignee, duly certified from the office of the Commissioner of the General Land at Washington, D. C.

49 4th. Assignments of said entry and survey, as follows:

(*a.*) Exemplification from the Commissioner of the General Land Office at Washington, D. C., of an assignment of one-fourth interest in the 500 acres called for by Virginia military exchange warrant No. 494 and of all the surplus in the location or survey which might be made thereunder from George H. Dawson and Sarah Ann Dawson (formerly Gordon), his wife, to David F. Heaton and dated April 18, 1849.

(*b.*) An exemplification from the Commissioner of the General Land Office at Washington, D. C., of an assignment of one-fourth interest in the 500 acres called for by Virginia military warrant No. 494 and of all the surplus that might be in said survey made by virtue of said warrant by Joseph F. Gordon, Margaret R. Francis, and Henry P. Francis, her husband, to David F. Heaton, May 16, 1849.

(*c.*) An exemplification from the Commissioner of the General Land Office at Washington, D. C., of an assignment by Henry P. Francis and Margaret R. Francis (formerly Gordon), his wife, of their interest in Virginia military exchange warrant No. 494 and the entry and survey to be made thereunder to David F. Heaton, dated January 14, 1858.

(*d.*) An exemplification from the Commissioner of the General Land Office at Washington, D. C., of an assignment by Joseph F. Gordon of his entire interest in Virginia military exchange warrant No. 494 and the survey 15882 made thereunder to David F. Heaton, dated 14th January, 1858.

The foregoing documents, from the warrant No. 494 above described to the last exemplification of assignment of interest in said warrant, entry, and survey, follow in the order named above, to wit:

50 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March* 20, 1876.

I, L. K. Lippincott, Acting Commissioner of the General Land Office, do hereby certify that the annexed is a true and literal exemplification of Virginia land office exchange military warrant No. 494, for 500 acres, on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[L. S.] L. K. LIPPINCOTT,
Act. Commissioner of the General Land Office.

Land Office Exchange Military Warrant No. 494.

To the principal surveyor of the land set apart for the officers and soldiers of the Commonwealth of Virginia:

This shall be your warrant to survey and lay off in one or more surveys for Joseph Gordon, Sarah Ann, and Margaret B. Gordon, children and heirs of Frances Gordon, one of the children and heir-at-law of John Gordon, the only heir of Thomas Gordon, dec'd, their heirs or assigns, the quantity of five hundred acres of land due unto the said heirs in consideration of the said Thomas Gordon's services for three years as lieutenant of cavalry in the Continental line, agreeably to a certificate from the Governor and council which is received into the land office.

Given under my hand and the seal of the said office this 16th day of June, in the year one thousand eight hundred and forty.

[L. S.] S. H. PARKER,
Reg. L. Office.

500 acres.

(Endorsed:) In pursuance of an advice of council I certify that this warrant has issued in conformity with laws of Virginia
51 in force prior to the cession by that State of her western lands to Congress, and I furthermore certify that no other warrant has issued from the land office of Virginia on account of the services of the within-mentioned Thomas Gordon, except warrants Nos. 8425, of which this is in part an exchange w't, Nos. 8426 [and] 8686 and exchange w'ts Nos. 492 and 493, which are in part of w't No. 8425, and that no grant has issued on this warrant.

Given under my hand and the seal of the said office this 16th day of June, 1840.

[L. S.] S. H. PARKER,
Reg. L. Office.

1849, December 18th. No. 15882.

Joseph Gordon, Sarah Ann and Margaret B. Gordon, and David F. Heaton, assignee, enter 500 acres of land on a military warrant (exchange) No. 494, on the waters of Lower Ohio Twin creek, beginning at two poplars, corner to James and Heaton entry No. 15881, and corner to Obannon, Graham, & Massie's surveys Nos. 2459 and 2558; thence southwesterly, binding on said survey and on Martin Maddon's survey, No. 3091, to two sugar trees northeasterly corner to last survey; thence north so far that an east line will strike the N. W. corner of said entry; thence south with a line thereof to the beginning.

Surveyor's office for the Virginia military district in the State of Ohio.

I, Eleazer P. Kendrick, principal surveyor of said district, do certify that the above entry, No. 15882, for 500 acres is a true copy from the records of this office.

Given under my hand and seal of office, at Chillicothe, this 4th

day of January, 1876, and the 99th year of the Independence of the United States.

[L. S.] E. P. KENDRICK.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *Dec.* 17, '75.

I, S. S. Burdott, Commissioner of the General Land Office,
52 do hereby certify that the annexed are true and literal exemplifications of two (2) surveys, No. 15882, founded on Virginia exchange military warrant No. 494, which surveys in the Va. mil. dist., Ohio, are on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington on the day and year above written.

[L. S.] S. S. BURDOTT,
Commissioner of the General Land Office.

Survey.

For plat see original bill of exceptions.

Surveyed for Joseph Gordon, Sarah Ann and Margaret B. Gordon, heirs, and David F. Heaton, assignee, 400 acres of land on part of military warrant No. 494 (exchange), 375 acres for said heirs and 25 acres for said Heaton, on the waters of Twin creek, a branch of the Ohio river, Scioto county, O., beginning at a white oak and dogwood, most northerly corner to David McCall's survey, No. 14305, on Middle Dry run, a branch of said creek; thence north 40 deg. east 157 poles to a poplar, southwesterly corner to David McCall's survey, No. 14304; thence with two lines and corners thereof north 37 deg. west 45 poles to three black oaks, north 55 deg. east 18 poles, crossing branch to a beech and ash, north 11 deg. east 100 poles to a white walnut and elm, northwest corner to David McCall's survey, No. 13117; thence with a line thereof north 22 deg. east 6 poles, crossing a branch to a sugar, dogwood, and beech, N. W. corner thereof, and corner to Farrow & Heaton's survey, No. 15888; thence with a line thereof north 54 deg. west 80 poles, crossing same branch to a poplar and maple, most southerly corner to Deen & Southerland's survey, No. 14778; thence leaving the same west 200 poles to a white oak and stake in the county line between Adams and
Scioto; thence with said line south 138 poles, crossing several
53 branches to a stone pile in left-hand branch of Dog Hollow, most northerly corner to McCall's survey, No. 15771; thence with two lines thereof south 52 deg. east 30 poles to a hickory and hornbeam on side of a hill, south 35 deg. west 100 poles, crossing several branches to a white oak, corner to same and corner to George Crawford's survey, No. 15231; thence with two lines thereof south 45 deg. east 56 poles to a black oak, south 54 degrees east 135 poles to a white oak in said line; thence leaving the same north 57 deg. east 48 poles to two red oaks and a beech N. W. corner to David

McCall's said survey, No. 14305; thence with a line thereof north 50 deg. east 15 poles to the beginning.

April 10, 1851.

D. F. HEATON, *D. S.*

C. ODEL.
R. ODEL.
C. C.

E. CLIFFORD, *Marker.*

Ex'd and recorded December 23, 1851.

E. P. KENDRICK, *S.*

Surveyor's Office for the Virginia Military District within the State of Ohio.

I, Eleazer P. Kendrick, surveyor of said military district, do certify that the warrant Ex. No. 494, on which the above survey No. 15882 for 400 acres is made, is in my possession, not satisfied; that the entry on which said survey is founded was made since March, 1807, and that the above-described land is not surveyed west of the boundary line run between the source of the Little Miami and Scioto rivers, established by a law of the United States, nor on any land previously surveyed as land of the United States.

Given under my hand and seal of office at Chillicothe this 26th day of December, 1851, and 76th year of the Independence of the United States.

[L. S.] E. P. KENDRICK.

54 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *January* 6, 1876.

I, S. S. Burdott, Commissioner of the General Land Office, do hereby certify that the annexed are true and literal exemplifications of certain papers in relation to the title of Virginia exchange military land warrant No. 494, which papers and warrant are on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington on the day and year above written.

[L. S.] S. S. BURDOTT,
Commissioner of the General Land Office.

Memorandum of an agreement made and entered into between Joseph Gordon, Margaret B. Francis and her husband, Henry Francis, and Sarah Ann Dawson and her husband, Geo. H. Dawson, of the State of Virginia, and David F. Heaton, of Portsmouth, Ohio, witnesseth: That the said Joseph Gordon, Margaret B. Francis and Henry Francis, her husband, and Sarah Ann Dawson and George H. Dawson, her husband, being the rightful owners of exchange military warrant No. 494, for 500 acres, issued to them by Virginia for the Revolutionary service of Lieutenant Thomas Gordon, and the said Heaton being a deputy surveyor of the Virginia military district in the State of Ohio, and the first-named parties being de-

sirous of having the said exchange warrant located, surveyed, and patented upon some of the land in said district, do, by these presents, covenant and agree with said Heaton to locate, survey, and cause to be patented to them three-fourths of the land due them in virtue of the said warrant, and to assign to him all the residue of the said warrant or land located in virtue of it.

In testimony whereof the respective parties to said contract
55 hereunto set their hands and affix their seals this 18th day of April, 1849.

JOSEPH H. DAWSON. [SEAL.]
SARAH ANN DAWSON. [SEAL.]

Witness:
FRANKLIN TURNER.

Memorandum of an agreement made and entered into between Joseph Gordon and Margaret R. Francis and Henry P. Francis, her husband, of Lewis county, State of Virginia, and David F. Heaton, of Portsmouth, Ohio, witnesseth: That the said Joseph Gordon, Margaret R. and Henry P. Francis being in part the rightful owners of Virginia military exchange warrant No. 494, for 500 acres, issued to them, the said Joseph and Margaret R., in part for the revolutionary service of Lieutenant Thomas Gordon, and said Heaton being one of the deputy surveyors of the military district in Ohio, and they being desirous of having their interest in the warrant thereon located, do by these presents employ said Heaton to locate, survey, and cause to be patented to them their interest in the aforesaid warrant; and for his services in locating, surveying, and procuring to be patented to them their interest as aforesaid they agree, respectively, to allow to him, the said Heaton, one-fourth of said warrant and land located in virtue of it so soon as he secures to them three-fourths by patent; he is to have the remainder for his trouble and expenses in the aforementioned locations, &c.

Given under our hands and seals this 16th day of May, 1849.

JOSEPH F. GORDON. [SEAL.]
MARGARET R. FRANCIS. [SEAL.]
HENRY P. FRANCIS. [SEAL.]

Witness:
DAVID H. SMITH.

For value received we, Henry P. Francis and Margaret R. Francis, late Gordon, assign to David F. Heaton one hundred
56 and twenty-five acres of Virginia military land warrant No. 494, exchange, issued in favor of said Margaret, together with Joseph F. Gordon and Sarah Ann, as heirs-at-law of Francis Gordon, dec'd, for 500 acres, which, together with one-fourth of said warant heretofore assigned to said Heaton for his services in locating and surveying the same, disposes of the whole of our interest in said warrant to said Heaton, being the one-third part thereof appropriated in entry No. 15882, and desire that a patent be issued in his favor accordingly.

Witness our hands this 14th day of January, 1858.

HENRY P. FRANCIS.
MARGARET R. FRANCIS.

Attest:

TIMOTHY McCARTHY.
MICHAEL McCARTHY.

For value received I assign to David F. Heaton one hundred and twenty-five acres of Virginia military warrant No. 494, exchange, issued in favor of Joseph F. Gordon, Sarah Ann and Margaret R., heirs-at-law of Francis Gordon, dec'd, for 500 acres appropriated in entry No. 15882, which together with one-fourth of said warrant heretofore assigned to said Heaton for his services in locating and surveying the same, disposes of the whole of my interest to said Heaton in said warrant, being the one-third part thereof, and desire that a patent be issued in his favor.

Witness my hand this 14th January, 1858.

JOSEPH F. GORDON.

Attest:

L. C. HEATON.
JAMES JONES.

LEONIDAS C. HEATON, a witness for the defendant, being sworn and examined, testified as follows:

I am a son of Major Daniel F. Heaton and was executor of his last will and testament. I am acquainted with survey 15882. I had charge of my father's papers after his death. I have seen
57 what purported to be an assignment from George H. Dawson and Sarah Ann Dawson, his wife, of their entire interest in survey 15882 to my father, David F. Heaton. It was in existence at one time, but after my father's death I never could find it. I know that my father claimed that he owned all of survey 15882, and was such owner at the time of his death.

Cross-examined:

Capt. Charles A. Barton had charge of my father's papers for some time after his death, but he could never find assignment from Dawson and wife to my father.

Capt. CHARLES A. BARTON, being recalled, stated that he had never seen the Dawson assignment among Major Heaton's papers.

The defendant further, to maintain the issues on his part, offered in evidence the following documentary evidence:

1. The record of the will of Major David F. Heaton, formerly of Scioto county, Ohio, together with the probate thereof from the probate court of Scioto county, O. Said will was executed 12th of August, 1868, and admitted to probate in said court November 11th, 1871.

2. The record of a deed from Leonidas C. Heaton, executor of the estate of David F. Heaton, dec'd, to one David M. Elliott from the

recorder's office of Scioto county, O., said deed being dated March 13, 1874, and recorded Sept. 13, 1874.

3d. The record of a deed from David M. Elliott to the defendant herein, John A. Coan, from the recorder's office of Scioto county, O., said deed being executed September 15, 1874, and recorded November 10, 1875.

The said will and two deeds are given, following in the order named, to wit:

58 *Will of David F. Heaton, Deceased, and Probate Thereof.*

In the Matter of the Estate of DAVID F. HEATON, Deceased.

Probate of Will.

Be it remembered that on the 11th day of November, A. D. 1871, a paper writing, purporting to be the last will and testament of David F. Heaton, dec'd, was produced before the court, and thereupon came C. L. Conway and Jordan Vigus, the attesting witnesses to said paper writing, who, being duly sworn according to law, testified to the due and legal execution of the same, and their testimony was reduced to writing and filed, and the court, being satisfied from said testimony that said paper writing was duly and legally executed by the said David F. Heaton as and for his last will and testament, and that at the time of the execution thereof he, the said David F. Heaton, was of full age and of sound mind and memory, and not under any restraint, and that he, the said David F. Heaton, is now dead, it is ordered that the said last will and testament of the said David F. Heaton, dec'd, the testimony, and this order be recorded in the record of wills for this county.

Will.

Whereas it is appointed once for man to die, and no man knowing the day nor the hour thereof, a prudent regard for the interest and welfare of his posterity frequently required that he should make some specific disposition of his estate, by will or otherwise, different from the common course of descent as established by law; and whereas I am satisfied that, owing to the complicated state of my interest in certain waste and unprofitable lands in said county and elsewhere, and other family matters connected with the interest of those who may come after me, that I should make and execute a will or executory devise with a view to empower my executor, hereafter named, to execute my said will and settle up my said estate
59 with as little expense as practicable without the inconvenience and trouble of applying to the courts for authority to sell lands and other matters connected therewith: Therefore, in consideration of the foregoing premises, I, David F. Heaton, of the city of Portsmouth, Scioto county, State of Ohio, aged seventy-six years, born at Kenton's Station, Mason county, Ky., on the 30th of June, 1792, being of sound mind and memory, and capable of transacting all my business affairs, do by these presents make, ordain,

publish, and declare in my own handwriting, without the aid and advice of counsel, this and the following to be my last will and testament, revoking all others—that is to say: First, That after my death that all my just and lawful debts be fully paid, if any should be due and unpaid, not owing anything at this time, and that after the settling up of said estate by my executor, hereinafter named, and paying up the legal costs and charges thereof, I divide the residue and remainder thereof into three equal parts or moieties, which I give, devise, and bequeath as follows—that is to say: First: I give, devise, and bequeath to my wife, Mira S. Heaton, the one-third part of my said estate, together with an annuity of twenty dollars per annum for and during her natural life, in lieu of dower. Secondly: I give, devise, and bequeath to my son, Leonidas C. Heaton, one other third part of my said estate, together with the revertionary interest of, in, and to the dower estate of my said wife, after her death, given and bequeathed to her in lieu of dower, whether she accepts under this will or not; I also give and bequeath to my said son my library of books, consisting of law, history, philosophy, medicine, poetry, astronomy, and other miscellaneous and humorous works, and to him, his heirs and assigns, forever. Thirdly: I give, devise, and bequeath to my grand-daughter, Katie Mary Heaton, the only
60 daughter of my deceased son, Ossian S. Heaton, the other one-third part of my said estate, to her and her heirs and assigns, forever. And I hereby nominate, constitute, and appoint my said son, Leonidas C. Heaton, sole executor of this my last will and testament, with full power and authority to sell all or any of said estate, real and personal, which he may deem necessary and proper, and for the benefit and interest of himself and codevisees and legatees, and for the purpose of raising funds to liquidate any just or legal claim that may be presented for payment, or for the purpose of defraying the expenses in the management and settling up of said estate, at private or public sale, as he may deem proper and best. And, having full faith and confidence in the honesty and integrity of my said son, I hereby authorize him immediately after my death to take upon himself the office and duties of executor of this my last will and testament, without giving any bond or security for the faithful discharge of the duties thereof.

In testimony whereof I hereunto set my hand and seal this 12th day of August, A. D. 1886.

DAVID F. HEATON. [SEAL.]

Attest:

JORDAN VIGUS.
C. L. CONWAY.

(*Testimony.*)

Probate Court.

STATE OF OHIO, } ss:
Scioto County, }

C. L. Conway and Jordan Vigus, of lawful age, being first duly sworn, deposeth and say that they saw the said David F. Heaton, of

said county of Scioto, execute the paper writing hereto attached purporting to be his last will and testament, and heard the said David F. Heaton acknowledge the same to be hie last will and testament. Affiants further say that they signed their names as attesting witnesses; and affiants further say that at the time of the execution of said last will and testament by the said David F. Heaton he, the said David F. Heaton, was of full age and of
61 sound mind and memory, and not under any restraint, and that said David F. Heaton is now deceased.

C. L. CONWAY.
JORDAN VIGUS.

Sworn to and subscribed in open court before me this 11th day of November, A. D. 1871.

A. C. THOMPSON,
Probate Judge.

Deed.

Know all men by these presents that I, Leonidas C. Heaton, of the city of Portsmouth, Ohio, as executor of the estate of David F. Heaton, late of Scioto county, deceased, in consideration of one thousand and four ($1,004) dollars to him as executor paid by David M. Elliot, of Nile township, county of Scioto, and State of Ohio, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said David M. Elliot, his heirs and assigns, forever the following tract or parcel of land lying and being situate in said Scioto county, and in the Virginia military district in said State of Ohio, to wit: Beginning at an elm stump south 82 west 57 links from a sugar tree beginning corner of survey No. 15587; thence with one line thereof south 14 deg. west 29½ poles to a dogwood and two chestnuts marked for S. W. corner to same and corner to Heaton's survey 15882; thence with one line thereof south 91 poles to a beech and oak in a branch N. E. corner to survey No. 14304; thence with one line thereof south 60 deg. 35′ west 42 poles to three B. oaks on top of ridge N. W. corner to same; thence south 73 deg. 25′ west 316 poles, crossing several branches and ridges, to a stone on the west bank of ravine 10 poles south of a branch of Dog Hollow in place of [a] hickory and hornbeam, east corner to survey No. 15771; thence N. 52 west with two lines of 15771 41 poles, crossing a branch at 12 poles, to a maple in the forks of Dog Hol-
62 low north corner to same survey; thence south 49½ deg. west 60 poles to a stake at intersection of same line with the line of Scioto and Adams county; thence with said county line west 3½ deg. west 500 poles to a white oak, corner to survey No. 15889; thence with line thereof east 212 poles to a poplar in a field S. W. corner to 14778 and N. W. corner to survey No. 14986; thence with several lines thereof south 30 deg. east 38 poles to a gum in a field; thence south 27 deg. east 64 poles to a stone in place of R. O. and hickory; thence south 40 deg. east 50 poles to stake in place of double lynn; thence south 32 deg. 60 poles to a stake in field; thence south 42 deg. east 26 poles to two W. O.; thence north 57 east 14 poles to two W. O.'s, N. W. corner, to survey No. 14886;

thence with two lines thereof south 72 deg. east 25 poles to B. O., ches. O., and spruce pine; thence south 40 deg. east 92 poles to the beginning, containing one thousand and four (1,004) acres, more or less, being part of survey No. 15882, and all the estate, title, and interest of the said Leonidas C. Heaton, either in law or equity, of, in, and to the said premises, together with all the privileges and appurtenances to the same belonging, and all the rents, issues, and profits thereof; to have and to hold the same to the only proper use of the said David M. Elliot, his heirs and assigns, forever. And the said Leonidas C. Heaton, as such executor, for himself, as executor, and for his heirs, executors, and administrators, do hereby covenant with the said David M. Elliot, his heirs and assigns, that he, as such executor, [is] the true and lawful owner of the said premises, and has full power to convey the same; that the title so conveyed is clear, free, and unincumbered; and, further, that he will warrant and defend the same against all claim or claims of all persons whomsoever.

In witness whereof the said Leonidas C. Heaton has hereunto set my hand and seal this 13th day of March, in the year
63 of our Lord one thousand eight hundred and seventy-four.

LEONIDAS C. HEATON, [SEAL.]
As Executor of the Estate of David F. Heaton, Dec'd.

Signed, sealed, and acknowledged, in presence of us:
W. H. REED.
AARON NOEL.

THE STATE OF OHIO, } ss:
County of Scioto, }

Be it remembered that on the 6th day of June, in the year of our Lord one thousand eight hundred and seventy-four, before me, the subscriber, a justice of the peace in and for said county, personally came Leonidas C. Heaton, as such executor, the grantor of the foregoing deed, and acknowledged the signing and sealing thereof to be his voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my official seal on the day and year aforesaid.

G. W. ELLIOTT, J. P. [SEAL.]

Received and recorded September 13, A. D. 1875.

H. A. TOWNE,
Recorder, S. C., O.

The above deed is a true copy of the original deed from Leonidas C. Heaton, ex'r, to David M. Elliott.

Witness my hand and the seal of the recorder's office, at Portsmouth, Scioto Co., O., December 20, A. D. 1877.

[L. S.] WILLIAM H. WILLIAMS,
Rec., S. C., O.

Deed.

Know all men by these presents that David M. Elliott, of Freestone Post Office, in consideration of fifteen hundred and five dollars to him paid by John A. Coan, of Vanceburg, Lewis Co., Ky., the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said John A. Coan, his heirs and assigns,
64 forever the following tract or parcel of land lying and being situated in said Scioto county and in the Virginia military district in said State of Ohio, to wit: Beginning at an elm stump south 82 west 57 links, now a sugar tree, beginning corner of survey No. 15587; thence with one line thereof south 14 deg. west 29½ rods to a dogwood and two chestnuts marked for S. W. corner to same and corner to Heaton's survey 15882; thence with one line thereof south 91 poles to a beech and ash in a branch N. E. corner to survey No. 14304; thence with one line thereof south 50 deg. 35′ west 42 poles to three B. oaks on top of ridge N. W. corner to same; thence 73 deg. 25′ west 316 poles, crossing several branches and ridges to stone on the west bank of ravine, 10 poles south of a branch of Dog Hollow in place of hickory and hornbeam, east corner to survey 15771; thence north 52 west with two lines of 15771, 41 poles, crossing a branch at 12 poles to a maple in the forks of Dog Hollow, north corner to same survey; thence south 49½ degrees west 60 poles to a stake at intersection of same line with the line of Scioto and Adams county; thence with said county line nor. 3½ deg. west 500 poles to a white oak corner to survey No. 15889; thence with line thereof east 212 poles to a poplar in a field, S. W. corner to 14778 and N. W. corner to survey No. 14886; thence with several lines thereof south 30 deg. east 38 poles to a gum in a field; thence south 27 deg. east 64 poles to a stone in place of R. O. and hickory; thence south 40 deg. east 50 poles to stake in place of double lynn; thence south 32 deg. E. 60 P. to a stake in field; thence south 42 deg. east 26 poles to two W. O.; thence north 57 east 14 poles to two W. O.'s N. W. corner to survey No. 14886; thence with two lines thereof south 72 deg. east 25 poles to B. O., ches. O., and spruce pine; thence south 40 deg. east 92 poles to the beginning, containing one thousand and four (1,004) acres, more or less, being part of survey No. 15882,
65 and all the estate, title, and interest of the said David M. Elliott, either in law or in equity, of, in, and to the said premises, together with all the privileges and appurtenances to the same belonging, and all the rents, issues, and profits thereof; to have and to hold the same to the only proper use of the said John A. Coan, his heirs and assigns, forever. And the said David M. Elliott, for himself and for his heirs, executors, and administrators, does hereby covenant with the said John A. Coan, his heirs and assigns, that he is the true and lawful owner of the said premises and has full power to convey the same; that the title so conveyed is clear, free, and unincumbered, and further, that he will warrant and defend the same against all claim or claims of all persons whomsoever.

And the said David M. Elliott, his executors and administrators,

hereby reserves a lien on the within-described land for the purchase-money thereof, which at the execution of this deed is unpaid.

In witness whereof the said David M. Elliot has hereunto set his hand and seal this 15th day of September, in the year of our Lord one thousand eight hundred and seventy-five.

DAVID M. ELLIOTT. [SEAL.]

Signed, sealed, and acknowledged in presence of us—
H. McCALL,
N. K. McCALL.

THE STATE OF OHIO, } ss:
County of Scioto, }

Be it remembered that on the 15th day of Sept., in the year of our Lord one thousand eight hundred and seventy-five, before me, the subscriber, a justice of the peace in and for said county, personally came David M. Elliott, the grantor of the foregoing deed, and acknowledged the signing and sealing thereof to be his voluntary act and deed, for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my 66 name on the day and year aforesaid.

H. McCALL, *J. P.*

The above deed is a true copy of the original deed from David M. Elliott to John A. Coan.

Witness my hand and the seal of the recorder's office, at Portsmouth, Scioto Co., O., December 20, A. D. 1877.

[L. S.] WILLIAM H. WILLIAMS,
Rec., S. C., O.

JOHN B. GREGORY, a witness for the defendant, being sworn and examined, testified as follows:

I am a surveyor by profession. I have been county surveyor for three years last past. I surveyed line separating the north part of survey 15882 from the south part, and being lines in dispute, in October, 1876; did the same at the request of defendant herein, but gave the plaintiff or his agents notice of the time of survey pursuant to law. In making the survey I had with me the following-described field-notes to aid me: 1st, field-notes of the original survey 15882; 2nd, field-notes of the deed from David F. Heaton to Nicholas Longworth hereinbefore referred to; 3d, the field-notes of the deed from the Ohio Agricultural and Mechanical College to the plaintiff, William J. Flagg, covering the same survey; 4th, field-notes of that part of Crawford's survey 15771 in Scioto county, Ohio. In making this survey I began at a beech and ash northeast corner to McCall's survey No. 14304, and ran thence with one line thereof south 30 deg. west 42 poles to three black oaks on the top of a ridge, the east point of the east and west line so frequently referred to by the witnesses. I had no difficulty in finding the three black

oaks. From the three black oaks I ran west on the line claimed by Flagg, and which is the red line on my plat of survey, which I attach hereto and make part of this my evidence.

(Here follows diagram marked p. 66½.)

67 In this red or Flagg line I ran west 330 poles, the distance called for in the Heaton-Longworth deed; thence on the same line and courses I continued a distance of 360 poles from the 3 black oaks, when I came to the line between Adams and Scioto counties; I then went back to the point in the red line 330 poles west from the three black oaks; from that point I ran south 15 deg. west to maple and stone pile, most northerly corner to Crawford's survey No. 15771. I found this corner in the left-hand side or edge of Dog Hollow in the run, and it is a corner called for in the deed from the college to Flagg. I ran thence south 50 deg. 25′ east 43 poles to the corner marked hickory and hornbeam. I did not find any trees at that corner, but only a stump of a hickory; also we found pieces of an ironwood or hornbeam. This course was on the hillside. I also found a marked line between maple and pile of stone and hickory and hornbeam corners. From the hickory and hornbeam corner to the three black oaks the course is north 73 deg. 25′ west, and the distance is said to be about 316 poles; however, I did not run this line. I calculated the contents of the survey according to the original calls, and found it to be about 400 acres, the amount called for by the survey.

Cross-examined:

John McCall, one Sullivan, and Samuel Cooper were present with me at the survey. I found no stone pile in the county line where the red line claimed by Flagg crosses the same. At the hickory and hornbeam corner at the west end of Coan's line we found only hickory stump—no marked corner; we found a piece of ironwood 5 or 5 feet long; we could not find where it grew.

SOLOMON B. MCCALL, a witness for defendant, being sworn and examined, testified as follows:

68 I am 56 years of age, and have always resided near the lands in controversy; have traced the blue or dark line on Gregory plat, marked as Coan's line, near the head of Gas Hollow; found a plainly-marked line with side lines on trees, fore and aft. I traced this line some distance. I know the hickory and hornbeam corner, and have known it since this suit began. I saw the hickory stump and piece of hornbeam. I never knew of Flagg working on this survey 15882, north of the black line claimed by Coan; at all events, he never worked or operated on said survey north of Coan's or the dark line between hickory and hornbeam and three black oaks prior to 1869. Flagg's peach orchard is south of the black line claimed by Coan. I worked quarrying stone for Flagg from 1865 to 1867. Flagg then told me not to trespass on any one or over the Heaton line. I last worked in the stone quarry

in Dog Hollow in 1867. Flagg was not then working north of the lines claimed by Coan, and did not work over the same prior to 1869. I saw Joseph Smith, surveyor, a witness in this case, after he had been surveying for Elliots in 1874. He passed my house in the evening. I asked him if he had found the hickory and hornbeam corner, and he said he had. The Cadens began quarrying in Scioto county, but I do not know exactly when it was.

Cross-examined:

I was not along at any survey of 15882 or any part thereof. I traced the marked line spoken of by me from Gas Hollow about ¼ of a mile along the blue or Coan line towards the hickory and hornbeam corner. This was in 1859; saw 2 or 3 marked trees. Do not know whether this line was toward hickory and hornbeam or not, but suppose it was. Flagg told me that this marked line was a division line between him and Heaton, and warned me not to trespass beyond it. He told me this in a quarry a mile from the line I suppose he meant the line I had traced. I was at home the
69 time Thomas Keys, surveyor, made resurvey for the college. He was intoxicated at the time, and came to my house intoxicated; said he had been surveying for the college.

LABAN W. ELLIOT, a witness for defendant, being sworn and examined, testified as follows:

Have lived for 20 years in the vicinity of the Gordon and Heaton entry and survey, but did not know much about it until recently. In 1874 my brother, David M. Elliot, and I employed Joseph Smith to survey the northern part of the survey. We started at the three black oaks and came out further north than we expected. We found no monument when we had run out the distance. By some means we got down to the hickory and hornbeam corner; we there found a hickory stump and a piece of an ironwood tree—some bark. I do not remember that we ran the black line Coan's line. Mr. Flagg was at this time quarrying north of the boundaries claimed by Coan.

SAMUEL MCGRAW, a witness for the defendant, being sworn and examined, testified as follows:

I reside on Upper Twin creek, near the Gordon & Heaton surv. Major David F. Heaton came to my house in 1856 or 1857, when he was surveying. He told me that he owned from poplar corner to 3 forks of Dog Hollow, and that there was a good deal of stone on his land. He gave me permission to peel bark and cut timber from my home towards the head of Dog Hollow.

The defendant then offered in evidence the following depositions in the order named: Deposition of George H. Puntenney; deposition of Washington McGraw; deposition of Samuel Cooper.

70 *Deposition of George H. Puntenney.*

1st question by HENRY OURSLER: What is your occupation?

Ans. Surveyor and real estate agent.

Ques. Have you at any time been engaged as agent for the Ohio Agricultural and Mechanical College; if so, what knowledge have you, if any, of their claiming title to the lands covered by Gordon & Heaton's survey No. 15882 of four hundred acres and of other persons claiming title thereto?

Ans. In the winter [of] 1871 or '72 Jas. M. Trimble, at that time president of the board of trustees of said college, employed me as agent to take charge of all the vacant lands in Adams and Scioto counties and stop all trespassing on said lands. At that time I went on Upper Twin creek, in Scioto county, to look after some vacant lands lying in that neighborhood. From the best information I had I supposed the Elliot brothers were logging a saw-mill off that vacant land. In order to stop any further trespass I concluded to run the line between what I supposed to be the surveyed land and the vacant land laying on Horner and branch of Upper Twin creek. While doing this I concluded to set off 40 acres to Peter Cooper, who claimed to have pre-empted the same. While running these lines the Elliots came and stopped us, claiming that they had a title for several hundred acres of land there entered in the name of Gordon & Heaton. I called for their title papers; they directed me to Esq. Laban Elliott, and told me to examine a deed, which was in his possession, which they claimed would cover it. I went there and found a deed of that description. This deed did not cover the land they claimed it did, but it covered the lands of Gordon & Heaton's survey No. 15882 of 400 acres, which they also were claiming and exercising ownership over. I then informed J. M. Trimble
of what I had done, and he instructed me not to disturb any
71 occupants on land entered prior to 1856. I thereupon ceased to further look after this land.

G. H. PUNTENNEY.

Deposition of Washington McGraw.

1st Ques. by H. OURSLER: Please state your name, age, and occupation and residence.

Ans. Washington McGraw; I am fifty-seven years old; am a farmer; live in Green township, Adams county, Ohio.

Ques. Are you acquainted with the parties to this action, W. J. Flagg and John A. Coan?

Ans. Yes, sir.

Ques. Are you acquainted with this tract of land in controversy?

Ans. Have been acquainted with it about twenty-seven years, and it is known as the Heaton and Gordon surv'y.

Ques. If you know, state who has been in possession of this land.

Ans. David F. Heaton, and those claiming under him.

Ques. Have you ever at any time been in possession of any part of it; if so, by whose permission?

Ans. I was; by permission of D. F. Heaton.

Ques. Are you acquainted with the west line of this survey passing through the quarry of Caden Brothers?

Ans. Yes, sir; about the year 1873 I was working for the Cadens in their quarry, and told them when they crossed a hollow they would enter on the lands of Elliot's claim.

Ques. Have you any knowledge of Elliot's exercising ownership over this land known as the Gordon and Heaton survey No. 15882?

Ans. I know they did; I saw them cutting and hauling timber off all portions of the land.

Ques. State what other facts you may know in regard to this land in controversy.

Ans. On the north line of this survey I carried the chain while they were making the division line between Heaton and
72 Moore after the line was run. I asked Mr. Heaton about buying fifty acres on his part; he told me to go ahead and clear, for I could have fifty acres, or all I wanted. Then I asked him about peeling bark. He told me to go ahead and peel what I wanted and pay him seventy-five cents per cord, and what other timber I wanted at what it was worth. This was in the year 1853. I moved from there during the following year, selling what improvements I had made on this land to my brother Samuel.

WASHINGTON McGRAW.

Deposition of Samuel Cooper.

1st Ques. State your name, age, place of residence, and occupation.

Ans. My name is Samuel Cooper; I am 57 years of age; I live in Green township, Adams county, Ohio; I am a farmer by occupation.

2d Ques. State if you are acquainted with the parties to this action.

Ans. I have been acquainted with Mr. Flagg, the plaintiff herein, for about fifteen or sixteen years; I have known John A. Coan, the defendant, all his life.

3d Ques. State if you are acquainted with the land in controversy in this case; if so, state how long you have known the same.

Ans. I am acquainted with the land in controversy, and have been ever since I can remember. I resided within one mile of it for more than thirty-five years.

4th Ques. State if you were acquainted with David F. Heaton.

Ans. I was well acquainted with him. I was acquainted with him twenty-five or thirty years before his death.

5th Ques. State if you ever knew of a survey being made of the land above referred to; and, if so, by whom?

Ans. Yes, I know of an original survey being made of it by David F. Heaton.

6th Ques. State if you ever acted as agent for Mr. Heaton
73 for this land; and if so, when?

Ans. I did act as agent for Mr. Heaton from the 1st of April, 1861, up to 1872.

EXHIBIT A.

Know all men by these presents that I, David F. Heaton, have this day nominated and appointed Samuel Cooper my true and lawful attorney, for me and in my name to take charge of all my lands lying between the county line and Upper Twin creek, in Nile township, bounded on the south by a tract of land I lately sold to Nicholas Longworth and on the north by Wm. C. Moore's land; and also to take charge of all my lands to the northeast of said Moore's land on the waters of Upper Twin; and I hereby give and allow to the said Samuel Cooper the right and privilege of peeling bark on said land at the rate of seventy-five cents per cord, river measure; and also to take and use any timber or hoop-poles he may want, he paying and accounting to me for what they may be reasonably worth, and to pay me for said bark and timber, &c., as soon as he may make sale of the same.

As witness my hand this 1st day of April, 1861.

(Signed) DAVID F. HEATON.

He appointed me agent by a written agreement, a copy of which is hereto attached to this my deposition, and marked "Exhibit A," and made a part hereof. It was a part of my duty, as agent of David F. Heaton, to protect the tract of land from trespassers.

7th Ques. State if there was any one else except Mr. Heaton in possession of this land during the time you acted as agent for him.

Answer. There was not.

8th Ques. State if, to your knowledge, during the time referred to, Mr. William J. Flagg ever exercised any acts of ownership over this land in controversy.

Ans. He did not.

74 9th Ques. State if you were ever agent for Wm. J. Flagg for lands in the vicinity of the lands in controversy; if so, state whether he ever claimed to you that he owned the land in controversy.

Ans. I was; he never claimed to me that he owned the land in controversy.

10th Ques. State under what circumstances you ceased to act as agent for Heaton on the land under controversy.

Ans. Shortly after the sale of this land from Heaton to Elliot, Heaton said to me that he had sold the land to David Elliot. Mr. Heaton further told me to take all the lumber I had on the land; Mr. Elliot told me the same.

11th Ques. State what you know as to the possession of the land in controversy since the sale of it to Mr. Elliot from Heaton.

Ans. Mr. David M. Elliot and his brother, Laban W. Elliot, took possession and went to cutting and sawing the timber from the land. David M. Elliott and his brother remained in possession of the land until they sold the land to Mr. John A. Coan. I never knew of Wm. J. Flagg, plaintiff, exercising any acts of ownership over or possession of this land in controversy; if he ever done so I think I certainly would have known it.

12th Ques. State what conversation, if any, you ever had with Wm. J. Flagg in reference to the land in controversy.

Ans. In the spring of 1874 the plaintiff, Wm. J. Flagg, came to my house and was anxious to have a private conversation with me, at which there should be no witnesses. Mr. Flagg went to the door twice to make sure that there was no witnesses about, and there was no one present except Mr. Flagg, my wife, and myself. He spoke of this tract now claimed by Coan and then owned by David M. Elliot. He stated that he had been to Washington city, and had lost his surveys, and he asked me if he had not better go to
75 David M. Elliott and buy this tract in question, and I told him I thought he had best do it; Mr. Flagg wanted to know how much of the stone quarries were covered by Elliott's survey, and I told him where the corners of the Elliott tract, now claimed by Coan, were. I am familiar with all the corners of this tract.

13th Ques State if there are any stone quarries on this tract in controversy and their probable value.

Ans. There are very valuable stone quarries on this land, and, in my judgment, the land is worth at least fifteen thousand dollars. This value arises from the fact that the stone quarries are on the land.

14th Ques. State whether at any time William J. Flagg ever recognized Heaton's title to this land in controversy during the time you were acting as Heaton's agent.

Ans. About 13 years ago some persons, who were cutting timber for Flagg, by mistake got over on the land in controversy and cut some of the timber. I told Flagg that his men had cut some of Heaton's timber, and he then told me that he would pay for it, and he would have the men stop cutting the timber, which was done.

his
SAMUEL x COOPER.
mark.

The foregoing being the evidence offered by the defendant in presenting his case, he thereupon rested, and the plaintiff proceeded to order his evidence in rebuttal.

WILLIAM J. FLAGG, being recalled, testified as follows:

I have not been in Samuel Cooper's house once in five or six years; I have never said anything to him such as he has testified to in his deposition; I never stated anything to him about
76 my title or my land; he was not my agent; I allowed him to cut hoop-poles on my land; I never had any interview with him such as he has testified to. I never told Solomon B. McCall that the black line or Coan line was my line, nor did I ever know or hear of a marked line between the north and south part of the survey.

HENRY MCCALL, being sworn and examined, testified as follows:

I know Samuel Cooper; live near his place; I know his reputa-

tion for truth where he resides, and it is bad; I would not believe him under oath, unless I knew from other sources what he testified to be true.

JOSEPH BROWN, being recalled, testified as follows:

I know Samuel Cooper; I know him too well; I could not believe him under any circumstances; I know his reputation for truth; it is bad; he is not to be believed.

Re-examined:

I have had a great many difficulties with him.

ADOLPH CADEN, being called in rebuttal, testified as follows:

I know Samuel Cooper and his reputation for truth; it is bad, and he is not to be believed.

Cross-examined:

I have had dealings with Samuel Cooper; we could not agree.

Thereupon the plaintiff offered in rebutting the deposition of Daniel McCarty, together with the exhibits A, B, C, D, E, F, and G thereto, and thereupon the defendant objected to the introduction of said deposition and the exhibits A, B, C, D, E, and F hereto as incompetent and irrelevant, and the court overruled defendant's objection and received said deposition and exhibits in evidence; to which ruling of the court in overruling defendant's objection and permitting said evidence to be introduced defendant excepted and prayed that his exception be noted, which was done.

77 The following is the deposition and Exhibits A, B, C, D, E, F, and G.

Deposition of Daniel McCarty.

Ques. What is your name, age, occupation, and residence?

Ans. Daniel McCarty; 53 years; lawyer by profession, and have been since December 12, '52, up to and ending 10th Oct., 1876, a clerk in the General Land Office, and from 1857 have had exclusive charge under the various commissioners of the office of all matters pertaining to the Virginia military district of Ohio; my residence is Washington city, D. C., at No. 234 New Jersey Ave. southern.

The business of the General Land Office is conducted as follows: When a letter is received at the said office it is referred to the division having charge of the subject-matter in relation to Virginia military matters; they are referred to Division H, the division of which I had charge then. The subject-matter is examined, a decision arrived at, embodied in a letter to the party in interest, which letter is submitted to the Commissioner for his approval evidenced by his signature, and is then recorded in full on the letter-books of this office, which books contain all and the only decisions of the Commissioner in relation to the subject-matter, whatever it may be. All such letters after being so recorded are promptly and carefully forwarded to the parties to whom they are addressed. A decision

granting or refusing to grant a patent for land in the said military district can only be found in the records of the letters. So far as this office is concerned there is no other record in respect to such business of the acts of the Commissioner. In relation to the application of L. C. Heaton for a patent on survey No. 15882 for four hundred acres of land in said district no appeal was ever taken, so far as I can learn from examining the records, after a full examination of
78 said records. From my knowledge of the business of the office I feel sure that all letters written to L. C. Heaton were promptly and carefully forwarded to him. The number of the warrant on which said application was made was exchange military warrant (Virginia) No. 494 for 500 acres, issued June 16th, 1840. At the request of the plaintiff herein, I attach exemplifications of five letters and resurvey of survey 15882, made Dec. 12, '72, by Thomas Keys. They are as follows: Exhibit "A," letter of the Commissioner of the General Land Office to James M. Trimble, dated 23, 1872; Exhibit "B," letter from the Commissioner of the General Land Office to L. C. Heaton, dated June 18, 1873; Exhibit "C," letter from the Commissioner of the General Land Office to L. C. Heaton, dated July 11, 1873; Exhibit "D," letter from the Commission of the General Land Office to L. C. Heaton, dated October 10, 1873; Exhibit "E," letter from the Commissioner of the General Land Office to L. C. Heaton, dated October 29, 1873; Exhibit "F," resurvey of survey 15882, made by Thomas Keyes, Dec. 12, 1872; Exhibit "G," letter from same to D. F. Heaton, dated Oct. 26, 1871.

Cross-examination:

Ques. In regard to Exhibit "H," attached to your deposition in chief, being letter of Dec. 23, 1872, addressed to James M. Trimble, who prepared this letter?

Ans. I did.

Ques. Was the resurvey mentioned in this letter as made by Thomas Keyes of Dec. 12, 1872, ever authorized or directed by the General Land Office?

Ans. It was not authorized by the General Land Office.

Question and answer both objected to by Wm. J. Flagg, the plaintiff, as incompetent.

The witness desires to say in explanation that the office had advised Mr. Trimble by letter, he being the agent of the Ohio
79 Agricultural and Mechanical College, that the office would receive any evidence tending to show any error or mistake made in the original survey, and that Mr. Trimble on the 19th of December, 1872, filed in the General Land Office what purports to be a resurvey of survey No. 15882, made by Mr. Keyes, as above stated.

The above explanation objected to as entirely incompetent testimony by the counsel for defendant.

Ques. What authority, if any, had the Gen. Land Office to recognize this resurvey by Thos. Keyes?

Ans. Only as putting it upon its guard against the satisfaction of a survey made for a greater portion of land than called for by the warrant upon which it purports to be founded.

Ques. Did not the Commissioner of the Gen. Land Office on the 2d October, 1875, in a letter addressed to the plaintiff herein, recognize the validity of survey 15882 to the extent of 500 acres as a valid and legal survey?

Objected to as incompetent.

Ans. No, sir; we did not recognize the validity of it at all; it was irregular in every respect.

Ques. In what did the irregularity consist?

Ans. It consisted in the office being satisfied that 1,200 and odd acres more land was embraced in the said survey 15882 than called for by the warrant upon which the same purported to have been founded.

Ques. Was the resurvey of Thomas Keyes made Dec. 12, '72, the only evidence which led the Commissioner to refuse the application for a patent to Heaton and others for survey 15882?

Ans. It was not the only reason; other reasons will appear in the exhibits hereto attached.

Ques. State if you were the clerk in this office who prepared all the letters hereto attached as exhibits.

Ans. All except that of July 11, 1873.

80 Ques. As to the letters written by you or prepared by you, attached hereto, being four in number, was the action therein taken determined by you in the first instance and afterwards approved by the signature of the Commissioner to the letters, or were they dictated by the Commissioner in the first instance to you?

Objected to as incompetent by plaintiff.

Ans. The letters were written under the direction of the Commissioner of the Gen'l Land Office.

[Ques.] Did you not prepare these letters yourself in the first instance, without consulation with the Commissioner of the Gen'l Land Office, and after preparation submit them to the Commissioner for his signature, which was attached?

Objected to as incompetent.

Ans. The Commissioner frequently consulted me in regard to the issuing of patents of these Virginia military surveys, and instructed me what course to pursue in relation thereto; I followed his instructions.

Ques. As to these particular four letters above referred to, before preparing them, did you in advance of their preparation consult with the Commissioner as to what their contents should be in respect to each letter?

Objected to as incompetent.

Ans. I cannot tell whether I did or not.

Ques. Were you the chief of the division in charge of Virginia military law matters of the Gen'l Land Office at the time these letters made exhibits to this deposition were prepared?

Ans. I was from 1857 to Oct. 11, 1876—from June 17th, 1857.

Ques. Is it not true, in point of fact, that during the time covered by these letters, instead of you consulting the Commissioner of the Gen'l Land Office in regard to matters in your division, he consulted you chiefly, and was in a great measure guided by your long experience in charge of the division?

81 Ans. He often consulted me in regard to action to be taken in my division, and instructed me what action the office should take. I do not know how far he was influenced by any suggestion made by me. Willis Drummond was appointed Commissioner on Feb. 13, 1871, as I understand.

Ques. Is it not true, in point of fact, that this survey, No. 15882, has by the Gen'l Land Office been recognized as a valid and legal survey from the time it was made up till the time Mr. Trimble filed his caveat, already herein referred to?

Ans. The office never passed upon the validity of the survey until after the filing of the resurvey, when it took up the whole question.

Ques. From the time of filing original survey 15882 to the time of filing Mr. Trimble's caveat was not the only obstacle which prevented the issuing of the patent the fact that the identity of the names of the warrantors as stated in the warrant and as contained in the assignment of the survey were not apparently the same persons?

Objected to.

Ans. That was not the only obstacle; Mr. Heaton's interest was not legally shown.

Ques. How long have you been personally acquainted with Mr. Flagg, the plaintiff?

Ans. About three or four years. I formed his acquaintance after the decision made in this case.

Ques. I call your attention to a letter from the Commissioner of the Gen'l Land Office to David F. Heaton, of date Oct. 26, '71, which I desire you [to] make Exhibit "G" to your deposition, and ask you if this was not the original letter forwarded by the Commissioner at its date to D. F. Heaton, and if it is not in your handwriting?

Ans. Yes, sir, and I make it Exhibit "G."

Ques. Were not the assignments of the survey 15882 from
82 the Gordon heirs to Heaton filed in this office after the date of the above letter?

Ans. Such assignments as were filed were filed after that date.

Redirect:

Ques. Had not the office information respecting the excessive quantity of survey 15882 from other surveys than that of Mr. Keyes?

Answer waived.

Ques. Did not the office approve of the Keyes survey being made?

Ans. The office being anxious to do what was right in the matter was ready to receive information from all proper sources, and treated that survey as such. I have never known a survey calling for a greater amount of land than mentioned in the warrant carried into patent where satisfactory evidence of an excess was produced to the office. Mr. Heaton had notice of this resurvey having been made and an opportunity afforded him to contest or rebut the same. The resurvey was never contested and no appeal from the decision taken.

Counsel for defendant objects to the whole of the foregoing deposition as incompetent.

DANIEL McCARTY.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *October* 21, 1876.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed are true and literal exemplifications from the record thereof in this office of a letter addressed to James M. Trimble on the 23d Dec., 1872, and of four several letters addressed to L. C. Heaton on the respective dates of June 18, 1873, July 11, 1873, October 10, 1873, and October 29, 1873.

In testimony whereof I have hereunto subscribed my
83 name and caused the seal of this office to be affixed at the city of Washington on the day and year above written.

[L. S.] J. A. WILLIAMSON,
Commissioner of the General Land Office.

EXHIBIT "A."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Dec.* 23, 1872.

James M. Trimble, Esq., Hillsboro, O.

SIR: I am in receipt of your letter of the 14th inst., inclosing as a caveat against the issue of a patent on survey No. 15882, for 400 acres of land in the Virginia military district, Ohio, the sworn resurvey of Thomas Keyes, surveyor, of date Dec. 12th, 1872, showing that the true area of the land contained within the boundaries of said survey is 1,682 acres.

No action looking to the issue of a patent in the case will be taken until you are further advised, and the claimants required to explain the excess if possible; otherwise no patent will be issued for a greater amount than is actually due in virtue of the warrant upon which said survey No. 15882 is founded, viz., 400 acres.

Very respectfully, your obedient serv't,

WILLIS DRUMMOND,
Commissioner.

EXHIBIT "B."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June* 18, 1873.

L. C. Heaton, Esq., Portsmouth, Ohio.

SIR: On the 26th of April, 1852, your testator, David F. Heaton, filed in this office for patent survey No. 15882, purporting to contain 400 acres of land in the Virginia military district, Ohio,
84 founded on Virginia exchange warrant No. 494, and granted for the services of Lieutenant Thomas Gordon, of the Continental Line, in the war of the revolution.

The issue of a patent in the case was suspended for discrepancies in the names of the warrantees and assignees for want of proof of marriage, &c., of which you have been heretofore fully advised.

I have now to inform you that in addition to the above-mentioned objections a caveat has been filed in this office in behalf of the board of trustees of the Ohio Agricultural and Mechanical College by James M. Trimble, Esq., of Hillboro, Ohio, the agent of the said board, protesting against the issue of a patent on said survey No. 15882, for the reason as alleged that the same contained a large excess of land over and above the amount stated therein, and actually due in virtue of said warrant exchange No. 494, and to sustain this charge there has been produced and filed the sworn resurvey of Thomas Keyes, civil surveyor, made on the ground, from which it appears that said survey No. 15882, instead of containing, as stated therein, 400 acres, actually embraces within its "calls" the precise amount of 1,682 acres, or 1,282 acres more than two hundred per cent. over and above the area it purports to contain, or was due on the warrant in question.

This office will not of course recognize the validity of any such survey as the foregoing, and must refuse, if there were no other objections, to carry the same into grant, and unless you deny the facts as above stated and wish to offer rebutting testimony, and be heard in reply, you will understand that the claim for patent in the case of said survey No. 15882 is rejected.

Should you, however, dispute the correctness of the said resurvey, &c., and will at once advise this office of the fact every reasonable opportunity will be afforded you to be heard in the case with such evidence as you may desire to present.

85 It is also proper that you should be advised that caveat*ed* of the same nature with that above mentioned have been filed in behalf of the said college against the issues of patents in virtue of surveys No. 15833, for 536⅔ acres, and No. 15882, for 100 acres, in which the said David F. Heaton was interested, but no resurvey has as yet been filed in either case.

Very respectfully, your obedient serv't,

W. W. CURTIS,
Act. Commissioner.

EXHIBIT "C."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July* 11, 1873.

L. C. Heaton, Esq., Portsmouth, Ohio.

SIR; In response to the application made in your letter of June 30, ult., you are advised that ninety (90) days from this date will be allowed you in which to establish your claim to the lands described in survey Nos. 15890 and 15887, for 77 acres; No. 15882, for 400 acres; No. 15882, for 100 acres, and 15833, for 536⅔ acres in the Virginia military district, Ohio, which caveats have been filed respectively by Messrs. Searle & Dever, attorneys, for Ellis Pemberton and James M. Trimble, Esq., agent for the board of trustees of the Ohio Agricultural and Mechanical College, of the nature of which you have been heretofore fully notified.

You are also advised that upon their request Messrs. Searle & Dever have been allowed further time—ninety days from this day—in which to procure and file in this office evidence to substantiate their allegations in regard to the said surveys Nos. 15890 and 15887.

Very respectfully, WILLIS DRUMMOND,
Commissioner.

86 EXHIBIT "D."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Oct.* 10, 1873.

L. C. Heaton, Esq., Portsmouth, Ohio.

SIR: On the 11th July last you were allowed ninety (90) days therefrom in which to file counter-proofs, &c., in the cases of surveys No. 15882, for 400 acres of land in the Virginia military district, Ohio, and Nos. 15890 and 15887, for 77 acres in said district, the former of which had been caveated by the trustees of the Ohio Agricultural and Mechanical College, and a resurvey filed therein showing an excess of 1,282 acres over and above the amount due in virtue of the Virginia military land warrant on which the same was founded.

You were advised on the 18th of June last of the rejection of your application for a patent in the case, but, at your request of the 30th of the same month, the matter was held open for the period above stated to afford you an opportunity to present rebutting testimony, &c.

The allotted time having expired and nothing presented on your part to sustain the validity of the said survey, you are hereby advised that the rejection of the case, as stated in my said communication of the 18th June last, is now made definite and final, so far as this office is concerned.

In the case of surveys Nos. 15890 and 15887, caveated by Messrs. Searle & Dever, in behalf of Ellis Pemberton, you were advised on the 4th inst. of the filing of a resurvey therein on the 2d inst. showing a very large excess, and informed that unless satisfactory evi-

dence was presented impeaching the correctness of said resurvey and substantially sustaining the accuracy of the original survey your application for the issue of a patent in the case must be
87 rejected, and I have now to advise you that unless such proofs are at once produced and filed you will understand that no patent will be issued in virtue of the survey in question.

I have advised James M. Trimble, Esq., the agent of the college, of the final rejection of your application for a patent in virtue of said survey No. 15882.

Very respectfully, your ob't serv't,

WILLIS DRUMMOND,
Commissioner.

EXHIBIT "E."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Oct.* 29, 1873.

L. C. Heaton, Esq., Portsmouth, Ohio.

SIR: I am in receipt of your letter of the 23d inst., and have to advise you in reply that so far as survey No. 15882 for 400 acres is concerned this office can take no further action in the matter.

The application for a patent thereon was rejected June 18th, 1873, as you were advised by my communication of that date. On the 11th July following you were allowed, upon your application for that purpose, ninety (90) days therefrom in which to file evidence showing the accuracy and correctness of the survey, notwithstanding the filing of a sworn resurvey showing an excess of 1,282 acres over and above the amount of 400 acres ostensibly called for by said survey. The said ninety days having expired, and no action taken on your part, on the 10th inst. my said decision of the 18th June last became final and operative, and a certified copy thereof was made and transmitted to James M. Trimble, the agent of the Ohio Agricultural and Mechanical College, of all of which you were duly advised by my communication to you of the said 10th inst.

88 In the case of surveys No. 15890 and 15887 for 77 acres, you were advised on the 4th inst. of the filing of a sworn resurvey showing an excess of more than 500 acres over and above the pretended quantity of land embraced by the original survey, and was informed that, unless evidence was filed on your part satisfactorily establishing the substantial correctness of the survey, the application for a patent thereon would be rejected. No such evidence, however, has yet been presented, and I have now to advise you that at the expiration of thirty (30) days from this date I will proceed to dispose of the case as it shall then appear from all the evidence presented.

In relation to survey No. 15833, for 536 acres, and No. 15882, for 100 acres, you are informed that no action will be taken thereon until the filing of the resurveys, which I am advised are now being made, and you will be at one advised of the receipt thereof.

Very respectfully, your ob't serv't.

WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *October* 21, 1876.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed is a true and literal exemplication of a certain paper on file in this office relating to survey No. 15882, in the Virginia military district, Ohio, and purporting to be a re-survey thereof.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[L. S.] J. A. WILLIAMSON,
Commissioner of the General Land Office.

89 EXHIBIT "F."

(For plat see original bill of exceptions.)

Field-Notes.—Beginning at a white oak and dogwood, most northerly corner to David McCall's survey No. 14305, on Middle Dry run, a branch of Upper Twin creek; thence north 40½ deg. east 153 poles to a stake in line of A. D. Kendrick's survey No. 15886; thence, with several lines of said survey, north 41 deg. west 45 poles to a gum; thence north 8½ deg. west 16 poles to a double poplar; thence north 14 deg. west 58 poles to a double poplar in a branch; thence north 57½ deg. east 74 poles to a stake in a line of survey No. 14304; thence, with several lines thereof, north 36 deg. west 35 poles to 3 black oaks on a ridge; thence north 56 deg. east 40 poles, crossing a branch, to a beech and ash; thence north 3½ deg. east 131 poles to a walnut and elm, N. W. corner to D. McCall's survey No. 13117 and S. W. corner to A. D. Kendrick's survey No. 14886; thence with several lines of 14886 north 41 deg. west 118 poles to a black oak, chestnut oak, and spruce pine; thence north 72 deg. west 32 poles to two white oaks; thence north 47 deg. west 11 poles to two (2) white oaks N. W. corner thereof and a southerly corner to survey No. 14986; thence with several lines thereof south 49 deg. west 16 poles to 3 white oaks and poplar; thence north 42 deg. west 50 poles to a red oak; thence north 33½ deg. west 60 poles to a double lynn; thence north 41 deg. west 48 poles to 2 red oaks and a hickory; thence north 29 deg. west 64 poles to a gum; thence north 34 deg. west 40 poles to poplar and maple N. W. corner thereof and S. W. corner to survey No. 14778; thence west 212 poles to a white oak and stake in county line, between Adams and Scioto county; thence with county line south 3 deg. east 616 poles
90 to a stake in a line of John McCall's survey No. 15771; thence with 3 lines thereof north 50 deg. east 73 poles to a pile of stones in left-hand fork of Dog Hollow; thence south 52 deg east 50 poles to a hickory and maple on the side of a hill; thence south 37 deg. west 172 poles to a white oak, corner to G. Crawford's survey No. 15231; thence with the same south 44½ deg. east 85 poles to a black oak on the top of a hill; thence south 53 deg. east 51 poles to

a stake in a line of A. D. Kendrick's survey 15886; thence with one line thereof north 34 deg. east 50 poles to 3 white oaks, a southerly corner of survey No. 15499; thence with the same north 26 deg. west 38 poles to 3 hickories; thence north 21 deg. east 56 poles to a white oak; thence south 64 deg. east 84 poles to 2 white oaks, a corner to A. D. Kendrick's survey No. 15886; thence with 15886 north 16 deg. west 40 poles to a beech and hickory; thence north 22 deg. east 56 poles to a hickory; thence north 4½ deg. west 29 poles to a poplar; thence north 59 deg. east 16 poles to a large white oak; thence south 34 deg. east 27 poles to a white oak and poplar; thence south 12 deg. west 53 poles to a white oak; thence south 7 deg. east 48 poles to a chestnut oak and red oak; then south 46 deg. east 35 poles to 2 chestnut oaks; thence south 15 deg. east 28 poles to a chestnut oak; thence south 5 deg. east 25 poles to 2 chestnut oaks; thence north 57 deg. east 48 poles to 2 black oaks, N. W. corner to David McCall's survey No. 14305; thence with line of the same north 52 deg. east 25 poles to the beginning, containing 1,682 acres.

Resurveyed by order of the trustees of the Ohio Agricultural and Mechanical College, December 12, 1872.

THE STATE OF OHIO, }
Scioto County, } *ss:*

Thomas Keyes, being first duly sworn, says the foregoing is a correct plat and field-notes of Gordon & Heaton's survey
91 No. 15882, as resurveyed, containing 1,682 acres.

THOMAS KEYES.

Sworn to and subscribed before me this 12th day of December, A. D. 1872.

[L. S.] S. B. DROUILLARD,
Clerk Scioto Common Pleas Court.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *October* 26, 1871.

SIR: I wish to advise you that this office is very desirous to dispose of the pending applications for patents for lands in the Virginia military district, Ohio, as soon as practicable, and with this object in view would call your attention to the case of survey No. 15882, for 400 acres, founded on exchange Virginia military land warrant No. 494, made in the names of Joseph Gordon, Sarah Ann and Margaret B. Gordon, and yourself, in the proportions of 375 acres to the said Gordons jointly and 25 acres to David F. Heaton.

This claim was filed by you April 26, 1852, and would long since have been satisfied but for the fact of your having failed to produce the evidence of your title in the case; in all other respects the claim is perfected. Your attention has been years ago called to the mat-

ter, but thus far without result. It is now expected that you will at once complete the case, so that the patent may be duly issued.

Very respectfully, your obedient serv't,

WILLIS DRUMMOND,
Commissioner.

David F. Heaton, Esq., Portsmouth, Ohio.

Thereupon, the plaintiff having concluded his evidence in rebuttal, the defendant offered in evidence the exemplification of a letter from

92 S. S. Burdott, Commissioner of the General Land Office, at Washington, D. C., to William J. Flagg, the plaintiff, at No. 1 East 28th street, New York, dated October 2, 1875, and duly certified as an exemplification by the Commissioner of the General Land Office under his signature and seal, which is as follows:

Letter from the Commisssoner of General Land Office to Plaintiff, October 2, 1875.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *October* 23, 1876.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed is a true and literal exemplification from the record thereof in this office of a letter addressed to William J. Flagg on the 2d day of October, 1875.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[L. S.]

J. A. WILLIAMSON,
Commissioner of the General Land Office.

EXHIBIT "G."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Oct.* 2, 1875.

Wm. J. Flagg, Esqr., No. 1 East 28th St., New York.

SIR: The surveys to which you refer in your letter of the 26th ultimo as made in the Virginia military district, Ohio, are probably Nos. 15882, one of which was made ostensibly for 400 acres and the other for 100 acres, the former of which was found by actual survey to contain 1,682 acres, and the other 517 $\frac{46}{100}$ acres, and both founded on Virginia exchange military land warrant No. 494, for 500 acres, so that there was an excess in the two cases—same No. survey—of 1,699 $\frac{46}{100}$ acres beyond the amount legally due.

93 This office, after full and careful examination of all the facts, evidence, &c., in the two several cases, refused to carry the said surveys into patent, of which decision—with full opportunity for appeal to the Secretary of the Interior, 60 days being allowed for that purpose—L. C. Heaton, Esq., of Portsmouth, Ohio, as executor of David F. Heaton, and acting in behalf of said estate and of the Gordon heirs, was duly advised. These cases remain in the same position, no appeal having been taken, and this office having no

reason to change its opinion as to the total irregularity of the surveys beyond the amount of 500 acres, the quantity of land due in virtue of the warrant in question.

I will cause you to be duly advised of any further application for patents in the claims, hould any such be presented, and no disposition thereof will be made until you have ample opportunity to present all such papers, statements, &c., as you may desire to have considered and to be heard in the case.

Very respectfully, your obedient serv't,

S. S. BURDOTT,
Commissioner.

And the foregoing being all the evidence offered by the plaintiff and the defendant, and all the evidence offered in the case on the trial, and thereupon, after argument of the case by the counsel, and after consideration of the evidence and the arguments of counsel, the court having found the issues joined in favor of the plaintiff, and the defendant having thereupon filed his motion for a rehearing and new trial for the following reasons, to wit:

1. The court erred in sustaining the demurrer by plaintiff to the 5th and 6th defences in the answer of defendant to plaintiff's petition.

94 2. The court erred in admitting in evidence on the part of plaintiff the written contract or title bond between Heaton and Coan and the assignments thereof from Coan to Smith, Smith to Flagg, plaintiff, and Flagg, plaintiff, to Longworth, the deed from D. F. Heaton and wife to Nicholas Longworth, of date January 18, 1858, and the items 12 of the will and 2nd item from the first codicil to the will of Nicholas Longworth, deceased, against the objection of defendant to such of said documentary evidence for competency and relevancy.

3. The court erred in admitting *the* evidence on behalf of plaintiff against the objection of defendant for want of competency and relevancy the deposition of Daniel McCarty, together with the following documentary evidence as exhibits thereto and offered therewith: Exhibit "A" thereto, letter to James M. Trimble from Commissioner of General Land Office, dated December 20, 1872; Exhibit "B," letter from the Commissioner of the General Land Office to L. C. Heaton, dated June 18, 1873; Exhibit "C," letter from the Commissioner of the General Land Office to L. C. Heaton, dated July 11, 1873; Exhibit "D," letter from the Commissioner of the General Land Office to L. C. Heaton, dated October 10, 1873; Exhibit "E," letter from the Commissioner of the General Land Office to L. C. Heaton, dated October 29, 1873; Exhibit "F," copy of resurvey of survey 15882, made by Thomas Keyes, civil surveyor, dated December 12, 1872.

4. The findings of the court in this case are against the defendant and in favor of the plaintiff, are against and contrary to the weight of the evidence, and are not sustained by sufficient evidence.

5. The findings of the court are against the law of the case.

95 6. The findings of the court upon the issues joined between the parties were for plaintiff, when, according to the law and evidence, they ought to have been for the defendant.

7. For other reasons to be shown in the hearing hereof.

And the court having heard said motion for a rehearing and a new trial, and having overruled the same, the said defendant excepted to the ruling of the said court on the said motion for a new trial and to the judgment therein rendered, and prayed the court here to sign and seal this their bill of exceptions and order the same to be made a part of the record of this case, all of which is done and ordered as said defendant has prayed for.

J. P. BRADBURY. [SEAL.]
S. S. KNOWLES. [SEAL.]
J. J. HARPER. [SEAL.]
Judges of the District Court, Scioto, Co., O.

Motion for a New Trial.

Scioto District Court.

WILLIAM J. FLAGG, Plaintiff,
vs.
JOHN A. COAN, Defendant.

Motion for a rehearing and new trial of the case.

Now comes the defendant, by John G. Marshall and N. W. Evans, his attorneys, and moves the court for a rehearing and new trial of this case for the following reasons, to wit:

1. The court erred in sustaining the demurrer by plaintiff to the 5th and 6th defences in the answer of defendant to plaintiff's petition.

2. The court erred in admitting in evidence on the part of plaintiff the written contract or title bond between Heaton
96 and Coan and the assignments thereof from Coan to Smith, Smith to Flagg, plaintiff, and Flagg, plaintiff, to Longworth; the deed from D. F. Heaton and wife to Nicholas Longworth, of date January 18th, 1858, and the items 12 and 2nd item from the first codicil to the will of Nicholas Longworth, deceased, against the objection of defendant to each and all of said documentary evidence for competency and relevancy.

3. The court erred in admitting *the* evidence on behalf of plaintiff against the objection of defendant for want of competency and relevancy the deposition of Daniel McCarty, together with the following documentary evidence as exhibits thereto and offered therewith: Exhibit "A" thereto, letter to James M. Trimble from Commissioner of General Land Office, dated December 20, 1872; Exhibit "B," letter from the Commissioner of the General Land Office to L. C. Heaton, dated June 18, 1873; Exhibit "C," letter from the Commissioner of the General Land Office to L. C. Heaton, dated July 11,

1873; Exhibit "D," letter from the Commissioner of the General Land Office to L. C. Heaton, dated October 10, 1873; Exhibit "E," letter from the Commissioner of the General Land Office to L. C. Heaton, dated October 29, 1873; Exhibit "F," copy of resurvey of survey 15882, made by Thomas Keyes, civil surveyor, dated December 12, 1872.

4. The findings of the court in this case are against the defendant and in favor of the plaintiff, are against and contrary to the weight of the evidence, and are not sustained by sufficient evidence.

5. The findings of the court are against the law of the case.

97 6. The findings of the court upon the issues joined between the parties were for plaintiff, when, according to the law and evidence, they ought to have been for the defendant.

7. For other reasons to be shown in the hearing hereof.

N. W. EVANS AND
JOHN G. MARSHALL,
Attorneys for Defendants.

98 STATE OF OHIO, } ss:
Franklin County, }

At a supreme court of the State of Ohio, begun and held at the court-room in the capitol in the city of Columbus, within and for said State, on Tuesday, the third day of January, in the year of our Lord one thousand eight hundred and eighty-two, before the Hon. John W. Okey, chief justice, and the Hons. William White, W. W. Johnson, George W. McIlvaine, and Nicholas Longworth, judges of said court, among other proceedings were the following, to wit:

JOHN A. COAN, Plaintiff in Error,

v.

WILLIAM J. FLAGG, Defendant in Error.

Be it remembered that heretofore, to wit, on the 9th day of April, A. D. 1878, there was filed in the clerk's office of said supreme court a certain motion clothed in the words and figures following, to wit:

99 Supreme Court of the State of Ohio.

JOHN A. COAN, Plaintiff,
v.
WILLIAM J. FLAGG, Defendant. } In Error.

Now comes John A. Coan, plaintiff in error, and moves the court for leave to file a petition in error in the above-entitled case.

N. W. EVANS AND
JOHN G. MARSHALL,
Attorneys for Plaintiff in Error.

And afterwards, to wit, on the day and date last aforesaid, there

was filed in the clerk's office of said supreme court a certain notice in the words and figures following, to wit:

100 Supreme Court of the State of Ohio.

JOHN A. COAN, Plaintiff,
v.
WILLIAM J. FLAGG, Defendant. } In Error.

To Messrs. Moore and Newman and Wells A. Hutchins, attorneys of record of the defendant in error above named:

Take notice that on Saturday, the 6th day of April, A. D. 1878, the plaintiff in error above named will apply to said court for leave to file petition in error to reverse the judgment of the district court of Scioto county rendered at its December term, A. D. 1877, in an action therein pending, wherein William J. Flagg, defendant herein, was plaintiff and John A. Coan, plaintiff herein, was defendant. The errors to be relied on in making said application are as follows:

First. Said district court erred in sustaining the demurrer of defendant in error to the 5th and 6th defences in the answer of defendant to petition of plaintiff below.

101 Second. The court erred in admitting in evidence on the part of plaintiff the written contract or title bond between Heaton and Coan and the assignments thereof from Coan to Smith, Smith to Flagg, plaintiff, and Flagg, plaintiff, to Longworth; the deed from D. F. Heaton and wife to N. Longworth, of date January 18th, 1858, and the items 12 of the will and 2d item from the first codicil to the will of Nicholas Longworth, deceased, aforesaid, against the objections of said plaintiff in error to such of said documentary evidence for competency and relevancy.

Third. Said district court erred in admitting *the* evidence on behalf of plaintiff below against the objection of defendant below for want of competency and relevancy the deposition of Daniel McCarty, together with the following documentary evidence as exhibits thereto and offered therewith: Exhibit "A" thereto, letter to James M. Trimble from Commissioner of General Land Office, dated December 20th, 1872; Exhibit "B," letter from the Commissioner of the General Land Office to L. C. Heaton, dated June 18th, 1873; Exhibit "C," letter from the Commissioner of the General Land Office to L. C. Heaton, dated July 11th, 1873; Exhibit "D," letter from the Commissioner of the General Land Office to L. C. Heaton,
102 dated Oct. 10th, 1873; Exhibit "E," letter from the Commissioner of the General Land Office to L. C. Heaton, dated October 29th, 1873; Exhibit "F," copy resurvey of survey 15882, made by Thomas Kayes, dated December 12th, 1872.

Fourth. The findings of said district court in the said action are against and contrary to the weight of the evidence, and are not sustained by sufficient evidence.

Fifth. The findings of said district court are against the law of the case.

Sixth. The findings of the court upon the issues joined between the parties were for said defendant in error, whereas, according to the law and evidence, they ought to have been for the plaintiff herein.

Seventh. Said district court rendered a judgment and decree in favor of defendant in error and against the plaintiff in error.

Eighth. The said district court erred in refusing the plaintiff in error a new trial and in overruling the motion of plaintiff in error for a new trial.

103 JOHN G. MARSHALL AND
N. W. EVANS,
Att'ys for Plaintiff in Error.

Service of the within notice is hereby acknowledged.
March 21st, 1878.

MOORE AND NEWMAN AND
W. A. HUTCHINS,
Att'ys of Wm. J. Flagg, Defendant in Error.

And afterwards, to wit, on the 16th day of April, A. D. 1878, the following entry was made on the journal of said court:

Motion for Leave to File a Petition in Error to the District Court of Scioto County.

JOHN A. COAN *vs.* WILLIAM J. FLAGG.

Ordered, That the motion be, and the same is hereby, granted.

And afterwards, to wit, on the day and date last aforesaid, there was filed in the clerk's office of said supreme court a certain petition in error in the words and figures following, to wit:

104 *Petition in Error.*

In the Supreme Court of Ohio.

JOHN A. COAN, Plaintiff in Error,
against
WILLIAM J. FLAGG, Defendant in Error.

The plaintiff in error, John A. Coan, says that at a special term of the district court of Scioto county, holden in December, A. D. 1877, in a certain action wherein the said defendant in error was plaintiff and this plaintiff was defendant, said district court rendered a judgment and decree in favor of said defendant in error and against this plaintiff in error, and for costs. A copy of the journal entries and all the original papers, together with the bill of exceptions, are herewith filed and made part hereof.

Plaintiff says in said proceedings and in the rendition of said judgment and decree said district court erred in the following particulars:

First. Said district court erred in sustaining the demurrer of defendant in error [to] the 5th and 6th defences in the answer of defendant to petition of plaintiff below.

105 Second. The court erred in admitting in evidence on the part of plaintiff the written contract or title bond between Heaton and Coan and the assignments thereof from Coan to Smith, Smith to Flagg, plaintiff, and Flagg, plaintiff, to Longworth the deed from D. F. Heaton and wife to N. Longworth of date January 18th, 1858, and the items 12 of the will and 2d item from the first codicil to the will of Nicholas Longworth, deceased, against the objections of said plaintiff in error to such of said documentary evidence for competency and relevancy.

Third. Said district court erred in admitting the evidence on behalf of plaintiff below against the objection of defendant below for want of competency and relevancy the deposition of Daniel McCarty, together with the following documentary evidence as exhibits thereto and offered therewith: Exhibit "A" thereto, letter to James M. Trimble from Commissioner of General Land Office, dated December 20, 1872; Exhibit "B," letter from the Commissioner of the General Land Office to L. C. Heaton, dated June 18th, 1873; Exhibit "C," letter from the Commissioner of the General Land Office to L. C. Heaton, dated July 11th, 1878; Exhibit "D," letter from the Commissioner of the General Land Office to L. C. Heaton,
106 dated October 10th, 1873; Exhibit "E," letter from the Commissioner of the General Land Office to L. C. Heaton, dated October 29th, 1873; Exhibit "F," copy of resurvey of survey 15882, made by Thomas Keyes, dated December 12th, 1872.

Fourth. The findings of said district court in said action are against and contrary to the weight of the evidence, and are not sustained by sufficient evidence.

Fifth. The findings of said district court are against the law of the case.

Sixth. The findings of the court upon the issues join-d between the parties were for said defendant in error, whereas, according to the law and evidence, they ought & have been for the plaintiff herein.

Seventh. Said district court rendered a judgment and decree in favor of defendant in error and against the plaintiff in error.

Eighth. The said district court erred in refusing the plaintiff in error a new trial and in overruling the motion of plaintiff in error for a new trial.

For these and other errors appearing on the face of said record and proceedings plaintiff ask- that the said judgment of said district court may be reversed, annulled, and held for naught, and said plaintiff in error restored to all things he has lost by reason thereof.

By N. W. EVANS AND
JOHN G. MARSHALL,
His Attorneys.

107 And afterwards, to wit, on the 19th day of April, A. D. 1878, there was filed in the clerk's office of said supreme court a certain waiver of summons in the words and figures following, to wit:

Supreme Court of the State of Ohio.

JOHN A. COAN, Plaintiff,
vs.
WILLIAM J. FLAGG, Defendant. } In Error.

PORTSMOUTH, OHIO, *April 18th*, 1878.

We hereby waive the issuing and service of summons in error in the above action, and hereby enter *my* appearance to the petition in error herein.

MOORE & NEWMAN AND
W. A. HUTCHINS,
Attorneys for Wm. J. Flagg, Defendant.

108 And afterwards, to wit, on the 30th day of May, A. D. 1882, the following entry was made on the journal of said court, to wit:

Error to the District Court of Scioto County.

JOHN A. COAN *v.* WILLIAM J. FLAGG.

This cause came on to be heard upon the transcript of the record of the district court of Scioto county, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court be, and the same is hereby, affirmed It is further ordered that the defendant in error recover of the plaintiff in error his costs herein expended, taxed at $——.

Ordered, That a special mandate be sent to the court of common pleas of Scioto county to carry this judgment into execution.

Ordered, That a copy of this entry be certified to the clerk of the district court of Scioto county for entry.

109 And afterwards, to wit, on the 22d day of June, A. D. 1882, the following entry was made on the journal of said court:

Error to the District Court of Scioto County.

JOHN A. COAN *v.* WILLIAM J. FLAGG.

The plaintiff in error having expressed his intention of removing this case into the Supreme Court of the United States by writ of error, on his motion, it is ordered to be certified and made a part of the record in this case, and of the judgment and entry of affirmance that the validity of the title and right of the plaintiff in error, John A. Coan, to the land described in the original petition of defendant in error, William J. Flagg, at the commencement of this action and in controversy was determined by the construction given the following mentioned treaty between the United States of America and the State of Virginia and the several acts of the Congress of the United States of America herein described by their respective titles, to wit:

The treaty by which the State of Virginia ceded to the United
110 States all lands owned or claimed by it northwest of the Ohio river (embracing the land in controversy in this action), being shown by the act of the General Assembly of the State of

Virginia passed Oct. 20th, 1783, entitled "An act to authorize the delegates of this State in Congress to convey to the United States, in Congress assembled, all the right of this Commonwealth to the territory northwestward of the river Ohio," and which grant by the State of Virginia was accepted by the United States of America by act of Congress, approved March 1, 1784; that the title of the plaintiff in error, John A. Coan, to the land in controversy in this action was upon an entry and survey made by virtue of a land warrant issued in pursuance of the laws of the State of Virginia enacted prior to said act of cession, to wit, the act of October, 1779, 10th volume of Henning's Statutes of Virginia, page 160, providing for land bounties to officers and soldiers of the Virginia line on continental or State establishment in the Revolutionary war; the act of May, 1779, 10th volume Henning's Statutes of Virginia, page 51, providing the manner in which soldiers of Virginia in the Revolutionary war upon Continental or State establishment should procure land warrants for their military services; the act of October, 1783,
111 11 volume Henning's Statutes of Virginia, page 353, prescribing the manner in which the warrants issued by virtue of the two acts recited last preceding should be located; also that the title of the plaintiff in error, John A. Coan, depended upon the construction given to the following-recited acts of the Congress of the United States of America: The act approved August 10, 1790, 2d vol. United States Laws, page 179, entitled "An act to enable the officers and soldiers of the Virginia line on continental establishment to obtain titles to certain lands lying northwest of the river Ohio, betwen the Little Miami and Scioto;" an act to amend the foregoing act, approved June 9th, 1794, 1st United States Statutes at Large, page 394; "An act to extend the time for locating Virginia military land warrants, for returning surveys thereon to the office of the Secretary of the Department of War, and appropriating lands for the use of schools in the Virginia military reservation in lieu of those heretofore appropriated," 2d U. S. Statutes at Large, page 424, approved March 2d, 1807; "An act to extend the time for locating Virginia military land warrants and for returning the surveys thereon to the Secretary of the Department of War," approved March 16, 1810, 2d U. S. Statutes at Large, page 589; "An act to further
112 extend the time for locating Virginia military land warrants and for returning the surveys thereon to the General Land Office," approved November 3d, 1814, 3d U. S. Statutes at Large, page 144; "An act to extend the time for locating Virginia military land warrants and returning surveys thereon to the General Land Office, and for designating the western boundary of the Virginia military tract, approved April 11th, 1818, 3d U. S. Statutes at Large, page 423; "An act to extend the time for locating Virginia military land warrants and returning surveys thereon to the General Land Office," approved February 9th, 1821. U. S. Statutes at Large, page 612.

"An act extending the time for locating Virginia military land warrants and returning surveys thereon to the General Land Office," approved March 1, 1823. 3d U. S. Statutes at Large, page 773.

"An act to extend the time for locating Virginia military land warrants and returning surveys thereon to the General Land Office," approved May 20, 1826. 4th U. S. Statutes at Large, page 190.

"An act to amend an act entitled an act to extend the time for locating Virginia military land warrants and returning surveys thereon to the General Land Office, approved May 20th, 1826," approved April 23d, 1830. 4 U. S. Statutes at Large, page 395.

"An act explanatory of the act entitled an act for the relief of officers and soldiers of the Virginia line and navy and of the continental army during the Revolutionary war, approved thirtieth of May, one thousand eight hundred and thirty," approved March 31, 1832. 4th U. S. Statutes at Large, page 501.

"An act to extend the time for locating Virginia military land warrants and returning surveys thereon to the General Land Office," approved July 7th, 1838. 5th U. S. Statutes at Large, page 262.

"An act further to extend the time for locating Virginia military land warrants and returning surveys thereon to the General Land Office," approved August 19th, 1841. 5th U. S. Statutes at Large, page 449.

"An act further to extend the time for locating Virginia military land warrants and returning surveys thereon to the General Land Office," approved July 29th, 1846. 9th U. S. Statutes at Large, page 41.

"An act further to extend the time for locating Virginia military land warrants and returning surveys thereon to the General Land Office," approved July 5th, 1848. 9 U. S. Statutes at Large, page-244, 245.

114 "An act further to extend the time for locating Virginia military land warrants and returning surveys thereon to the General Land Office," approved February 20th, 1850. 9 U. S. Statutes at Large, page 241.

And this court orders it to be certified furthermore and made a part of the record in this case, and of the judgment and entry of affirmance, that the plaintiff in error, John A. Coan, specially set up, claimed, and asked the court to hold that he had a good and valid title to the land in controversy in this action by reason of the treaty and acts hereinbefore recited, and of a warrant entry and survey thereunder and owned by him at the time of the commencement of the original action herein, and that his claim and title to said land in controvesy should prevail against the claim and title of the defendant in error, William J. Flagg, acquired by virtue of the act of the Congress of the United States of America entitled "An act to cede to the State of Ohio the unsold lands in the Virginia military district in said State," approved February 18, 1871, and the acts of the General Assembly of the State of Ohio accepting the cession under said act of Congress, as follows: An act to sell land

115 ceded to the State by the United States by act of Congress approved February 19th, 1871," passed March 26th, 1872, and the act amendatory thereof and supplemental thereto, passed April 29, 1872; also "An act accepting the act of Congress of the United

States, approved February 18, 1871, ceding to the State of Ohio certain lands in the Virginia military district and to provide for the disposal of the same, and to repeal certain acts hereinafter mentioned," passed April 3, 1873, and a deed for said lands in controversy, in pursuance of said acts, from the board of trustees of the Ohio Agricultural and Mechanical College to the defendant in error, William J. Flagg.

And it is further certified that in the decision of this case this court held and decided that the title of the plaintiff in error, John A. Coan, to the land in controversy acquired by virtue of the treaty and acts hereinbefore recited was invalid, and that the title of the defendant in error, William J. Flagg, to the land in controversy in this case acquired, as claimed by him, by virtue of the act of Congress of February, 18, 1871, and the acts of the Legislator of the State of Ohio before recited was valid, and this court affirmed
116 the judgment of the district court of Scioto county, Ohio, decreeing the title of the lands in controversy in this action to be in the defendant in error, William J. Flagg, and not in the plaintiff in error, John A. Coan.

And is further certified by this court that the question of the validity of the act of Congress entitled "An act to construe and define an act to cede to the State of Ohio the unsold lands in the Virginia military district, in said State, approved February 18th, 1871, and for other purposes," approved May 27, 1880, was considered in the decision of the court in this case, and that the decision of the court was in favor of the validity of said act as against the plaintiff in error, John A. Coan.

And it is also certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case can be had.

117 I, Dwight Crowell, clerk of the supreme court of the State of Ohio, do hereby certify that the above and foregoing is a true and correct transcript of the records in said cause, as appears from complete record-book No. 4, pages 142 to 147.

Witness my hand and the seal of said court this 1st day of September, A. D. 1883.

[Seal of the Supreme Court of the State of Ohio.]

DWIGHT CROWELL,
Clerk Sup. Court of Ohio.

118 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Ohio before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John A. Coan, plaintiff in error, against William J. Flagg, defendant in error, wherein was drawn in ques-

tion the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Con-
119 stitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said John A. Coan, plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the ninth day of November, in the year of our Lord one thousand eight hundred and eighty-three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

STANLEY MATTHEWS,
Associate Justice of the Supreme Court of the United States.

Nov. 9, 1883.

120 Supreme Court of Ohio.

STATE OF OHIO:

In obedience to the command of the written writ, I hereby return the same with the record in the case within named duly certified by me. Also herewith I transwit original citation to defendant in error, Wm. J. Flagg, with affidavit of service thereon, and certified copy of bond of plaintiff in error for costs.

Witness my hand and the seal of said court this 17th day of November, A. D. 1883.

[Seal of the Supreme Court of the State of Ohio.]

DWIGHT CROWELL, *Clerk.*

121 The United States of America to William J. Flagg, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington

on the second Monday of October next pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio, wherein John A. Coan is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stanley Matthews, associate justice of the Supreme Court of the United States, this ninth day of November, in the year of our Lord one thousand eight hundred and eighty-three.

STANLEY MATTHEWS,
Associate Justice, &c.

122 On this thirteenth day of November, in the year of our Lord one thousand eight hundred and eighty-three, personally appeared James M. Dawson before me, the subscriber, Alex. C. Woodrow, a notary public in and for Scioto county, Ohio, and makes oath that he delivered a true copy of the within citation on the 13th day of November, A. D. 1883, at Portsmouth, Ohio, to Col. O. F. Moore, one of the attorneys of the defendant in error, William J. Flagg.

JAMES M. DAWSON.

Sworn to and subscribed the 13th of November, A. D. 1883.

[Notarial Seal, Scioto Co., Ohio.]

ALEX. C. WOODROW,
Notary Public in & for Scioto County, Ohio.

123 Copy.

Know all men by these presents that we, John A. Coan, Henry Oursler, and J. W. Shinn, are held and firmly bound unto William J. Flagg in the full and just sum of two hundred and fifty (250) dollars, to be paid to the said William J. Flagg, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 15th day of October, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas lately at a term of the supreme court of the State of Ohio, in a suit depending in said court between John A. Coan, plaintiff in error, against William J. Flagg, defendant in error, judgment was rendered against the said John A. Coan; and the said John A. A. Coan having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said William J. Flagg citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said John A. Coan shall prosecute his said writ of error to effect and an-

swer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) JOHN A. COAN. [SEAL.]
" HENRY OURSLER. [SEAL.]
" J. W. SHINN. [SEAL.]

Sealed and delivered in presence of—
(Signed) G. W. PETTIT.
" W. A. CORYELL.

Approved by—

STANLEY MATTHEWS,
Associate Justice, &c.

124 State of Ohio, Supreme Court Thereof.

I, Dwight Crowell, clerk of the supreme court of Ohio, having examined the within bond, on which John A. Coan appears as principle, and Henry Ousler and J. W. Shinn appear as sureties, do hereby approve the same.

[SEAL.] DWIGHT CROWELL,
Clerk Sup. Court of Ohio.

CLERK'S OFFICE, SUPREME COURT OF OHIO.

I, Dwight Crowell, clerk supreme court of Ohio, do hereby certify the foregoing is a true copy of the original bond now on file in this office in the case of Wm. J. Flagg *v.* John A. Coan.

Witness my hand and the seal of said court this 17th day of November, A. D. 1883.

[Seal of the Supreme Court of the State of Ohio.]

DWIGHT CROWELL, *Clerk.*

Endorsed on cover: Ohio supreme court. No. 214. John A. Coan, plaintiff in error, *vs.* William J. Flagg. Filed 21st November, 1883.

123-117

123-117 No. 21.

Office Supreme Court U. S.
FILED.
OCT 24 1887
JAMES. H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1887.

JOHN A. COAN, Plaintiff,

AGAINST

WILLIAM J. FLAGG, Def'nd't.

In Error to the Supreme Court of the State of Ohio.

BRIEF FOR PLAINTIFF.

A. G. THOMPSON,
Of Counsel for Plaintiff.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1887.

JOHN A. COAN, Plaintiff,

AGAINST

WILLIAM J. FLAGG, Def'nd't.

In Error to the Supreme Court of the State of Ohio.

BRIEF FOR PLAINTIFF.

A. G. THOMPSON.
Of Counsel for Plaintiff.

SUPREME COURT OE THE UNITED STATES.

JOHN A. COAN, Plaintiff,

Against

WILLIAM U. FLAGG, Defendant.

BRIEF FOR PLAINTIFF BY WAY OF REPLY TO BRIEF FOR DEFENDANT.

Counsel for Defendant, on page fourteen of their brief, referring to the effect and operation of the Act of Congress of February 18, 1871 ceding to the State of Ohio certain lands in the Virginia Military District, say: "The only limitation, therefore, there is upon the title so acquired by the State, is the limitation that was upon the title of the United States at the time of the acceptance of cession," and also "we have seen, also, that the manifest purpose of the act of cession was to transfer to the State of Ohio all the land remaining in the District not already appropriated, either by patent granted, or by Survey, *valid and legal*, not only as to subsequent locators under military warrants, but as to the Government itself."

I controvert these assumptions as unwarranted by the language or spirit of the act, or of any Congressional legislation relating to these lands.

At the time of the passage of the act the lands in this District might well have been classified as follows:

1. Lands duly and legally entered, surveyed and patented.

2. Lands duly and legally entered and surveyed and entitled to be patented.

3. Lands duly and legally entered and surveyed, but not entitled to be patented, because the surveys were not returned to the General Land Office within the time prescribed by law.

4. Lands entered and surveyed,—where the surveys have been returned to the District Land Office, and may or may not have been returned to the General Land Office—but not entitled to be patented, because of fraud,—fraud in embracing an excessive quantity of land in the survey or in some other respect.

5. Lands known in the locality as vacant lands,—lands which were never surveyed.

Clearly the lands of the fifth class *were*, and those of the first and second classes were *not* transferred by the act of cession. But the question is as to whether that act included the lands of the third and fourth classes. The title of the United States to these lands has never been divested. We have no controversy with defendant's Counsel on that point. The Government might at any time assert its title to these lands, but I contend that it did not do so by the act of February 18, 1871. She ceded by that act only the "lands *remaining unsurveyed* and unsold" and not all the lands to which she *might* assert title.

If it had been the intention to cede *all* lands, to transfer to the State of Ohio all lands to which the Government might assert title, some language appropriate for that purpose would have been used, but it is evident that the mind of Congress was not directed to any question of the disposition of lands covered by irregular or fraudulent surveys, but dwelt soley upon the disposition of the vacant lands--the lands *remaining unsurveyed*, which were in the occupation of "squatters" and were of little value. The lands covered by irregular and fraudulent surveys have long since passed out of the hands of the original locators—they are now in the hands of innocent holders, many of them in the hands of people born

and reared upon them, who have grown from childhood to manhood and from manhood to old age in the belief that their titles under these surveys were good. And for seventy-five years the Government has stood by permitting these lands to be cultivated, improved, bought, sold and made to bear their full share of the burdens of Government, without attempting to assert its title to them, or in any way disturbing the possession of their occupants. And yet notwithstanding all this the Court is now asked to presume that these lands were ceded by the Government without any provision being made for the protection of these occupants, other than such as is given to the mere "squatter" and trespasser. The presumption would be a violent one. The first act of Congress relating to the lands within the Virginia Military District was passed August 10, 1790 and from that day to this there has been no act of Congress looking to the recovery by the Government of lands covered by irregular or fraudulent surveys, nor has the Executive Department of the Government ever sought to recover these lands on behalf of the United States. It is true that in settling controversies between opposing claimants, the Courts have set aside surveys and patents too, for irregularity or fraud, but no proceedings for that purpose have been instituted on behalf of the United States. So there is nothing in the history of the dealing of the Government with these lands to justify the construction claimed for the act of 1871. The language of the act was not "that the lands in the Virginia Military District in the State of Ohio belonging to the United States, or to which the United States has title be, and the same are hereby, ceded" &c., but, only, "That the lands remaining *unsurveyed* and unsold" &c., be ceded &c. This is the language of limitation, of reservation, and not as counsel for defendant say, "sweeping in its terms," carrying *every* right of the United States to any of the lands in this District. And if we are to enter the field of presumption in aid of construction, then I submit that the reasonable presumption is that Congress used this guarded language to limit the cession to the "vacant lands"—the

lands that have never been surveyed, in order to avoid disturbing the titles to a large portion of the lands in the most populous part of the state of Ohio—lands in twenty-two counties of that state. Neither the United States nor the state of Ohio contemplated the consequences to the people of the Virginia Military District of the construction now placed upon this act by the grantee of the state, the "Ohio Agricultural and Mechanical College"—a construction born of the zeal of the agents of this College in their hunt for lands under the grant. The legislation of both governments has been lenient and liberal. In this very act of cession and that of the General assembly of Ohio accepting the cession, provision is made by which even "squatters," who occupied the unsurveyed lands, without shadow or claim of right, are permitted to hold forty acres without paying therefor a single dollar, and as much more as they may occupy, not exceeding one hundred and sixty acres, upon paying for the same at the rate of one dollar per acre—the land to be surveyed and set off to them and deeds executed and delivered to them by the state, investing them with a perfect title. If this provision was made for those whose possession was admittedly wrongful, and whose improvements were in keeping with the character of their tenure, what provision should have been made for those who purchased their lands and made valuable improvements, upon the faith of surveys made by the Government itself and entered and preserved in its public records? Surely it was not intended to put them upon the same footing with mere 'squatters" and trespassers. Manifestly the question of the disposition of these lands was not under consideration by Congress, but was reserved for future consideration and action, or for the purpose of permitting them to remain in undisturbed possession of their lands.

This argument admits for the sake of the argument that the survey in question was either fraudulent because of the excessive quantity of land embraced therein, or irregular and invalid because it was not returned to the General Land Office within the time prescribed by law, but we do not by

any means admit this to be true as a matter of fact and have argued that branch of the case fully in the original brief for plaintiff in error. If, however, the Court should hold it to be true then in the view I have presented here it still follows that the lands embraced in survey No. 15,882 did not pass to the State of Ohio by the act of 1871, and the defendant in error is without title, legal or equitable and his bill must fail, unless the fourth section of the act of May 27, 1880 operated as a grant to him of these lands. The Supreme Court of Ohio held substantially, that to prevent this section from becoming inoperative and void they would treat it as a ratification and confirmation on the part of the United States, of defendant in error's title. This conclusive to my mind is utterly inconsistent with the first section of the act The college had been hunting up every survey that appeared to have a little surplus, a few more acres than the warrant called for, and was assuming to sell and convey all the lands embraced in them and had instituted proceedings in the General Land Office to prevent the issuing of patents upon these surveys, when Congress intervened to prevent this abuse and declared in the first section of the act of May 1880 that the act of 1871 had "no reference to lands which were included in *any* survey or entry within said district," and yet according to the ruling of the Supreme Court of Ohio, Congress turned about and in the fourth section by a new grant conveyed all these lands to the grantees of the College. This construction is opposed to the purpose and spirit of the act and would practicably defeat its operation. Whatever may have been the purpose of this fourth section, Congress certainly did not intend to grant to strangers the lands which had been reserved by the act of 1871 for the innocent purchasers thereof who were in possession, and for whose further protection the act of 1880 was passed.

A. C. THOMPSON,
Of Counsel for Plaintiff in Error.

2-3-117

FILED
FEB 9 1887
JAMES H. MCKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

October Term, 1886.

No. 214.

JOHN A COAN,

Plaintiff in Error,

vs.

WILLIAM J. FLAGG,

In Error to the Supreme Court of the State of Ohio.

ARGUMENT FOR DEFENDANT IN ERROR.

CHARLES & WM. B. KING, 915 F Street, Washington, D. C.,
N. W. EVANS and HON. A. C. THOMPSON, of Portsmouth, Ohio, Solicitors for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1886.

No. 214.

JOHN A COAN,

Plaintiff in Error.

vs.

WILLIAM J. FLAGG,

In Error to the Supreme Court of the State of Ohio.

ARGUMENT FOR DEFENDANT IN ERROR.

CHARLES & WM. B. KING, 915 F Street, Washington, D. C., N. W. EVANS and HON. A. C. THOMPSON, of Portsmouth, Ohio, Solicitors for Plaintiff in Error.

This case comes into this Court by a writ of error directed to the Supreme Court of the State of Ohio.

STATEMENT OF FACTS.

This action involves the title and right of possession to the northern portion of survey 15,882 in the Virginia Military District of Ohio. The land in controversy is situated in Nile Township, Scioto County, Ohio.

The facts will sufficiently appear in the statement of the plead-

ings and of the titles of the parties to the suit as introduced upon the trials of the case in the Common Pleas and District Courts of Scioto County Ohio.

STATEMENT OF THE PLEADINGS.

The action began in the Common Pleas Court of Scioto county, Ohio, was by William J. Flagg, plaintiff, vs. John A. Coan, defendant, a bill to quiet the alleged title and possession of defendant in error to survey 15,882, Virginia Military District, against the plaintiff in error. The suit was brought October 19, 1875. Defendant in error claimed the legal title to and that he was in possession of survey 15,882. He alleged that the plaintiff in error had lately set up a claim to the northern portion of the survey, and was threatening to commit waste and trespass thereon, and praying that he be forever enjoined from asserting any claim to the premises. The plaintiff in error answered, setting up six defenses.

First, he disclaimed any title to that portion of survey 15,882 south of the black line running from the most westerly corner of survey 14,304 to the northeastern corner of survey 15,771. (See plat inserted in the printed record between pages 42 and 43.) He alleged that he was the owner of that portion of survey 15,882 north of the line described, and denied the title, ownership and possession of defendant in error therein.

The second defense was adverse possession by plaintiff in error and those under whom he claimed, for more than twenty-one years, prior to the commencement of the suit.

The third defense, and most important of all, was the equitable title in plaintiff in error under and by virtue of a warrant, entry and survey of the land claimed under the laws regulating the acquirement of titles in the Virginia Military District prior to 1871. He alleged that the warrant, entry and survey were legal and valid, and had appropriated the land; that he was the owner of the entry and survey at the commencement of the suit, was entitled to a patent and had applied for the same.

The fourth defense was that the only title of the defendant in error was a pretended deed from the Ohio Agricultural and Mechan-

ical College, to him made, under the supposed authority of the act of the Legislature of Ohio of April 3, 1873, accepting the cession of unsurveyed and unsold lands in the Virginia Military District of Ohio, and granting the same lands to the Ohio Agricultural and Mechanical College, and that at the time Congress passed said act of February 18, 1871, this particular land had been appropriated by a previous legal and valid entry and survey (being the same mentioned in the third defense,) and that therefore defendant in error took no title by said deed.

The fifth defense was that defendant in error had procured his college deed by fraudulent and corrupt acts and practices upon the agents of the college, and that for these reasons the deed was void. The allegations of this defense furnish interesting reading matter, but need not be further quoted here.

The sixth defense was to the effect that the college, prior to making the deed to the defendant in error, had failed to comply with the act of April 3, 1873, requiring this land to be divided into lots of 500 acres each, to have plats and surveys thereof made and recorded in the office of the Auditor of State, and to have the land appraised prior to sale, and that for the want of these prerequisites the deed was void.

The plaintiff in error prayed the court to adjudge his title by entry and survey valid, and that defendant in error be perpetually enjoined from disturbing his possession. He also alleged that the pretended deed of the defendant in error from the Ohio Agricultural and Mechanical College was a cloud upon his title, and asked that the court should declare the same invalid and void as against the premises claimed by plaintiff in error.

The defendant in error replied to the second, third and fourth, and demurred to the fifth and sixth defenses..

His reply to the second defense denied the twenty-one years adverse possession, and said that even if such were the case, he denied that plaintiff in error could acquire any title thereby, because, as he said, that until February 18, 1871, the title to said premises was, and continued to be, in the Government of the United States.

His reply to the third defense was to the effect that the entry and survey of the Gordons and Heaton were invalid, and had been so declared by the Commissioner of the General Land Office, on account of defects in the assignment of the warrant and surplus in the quantity of land included in the survey.

His reply to the fourth defense was to the effect that his college deed was good and valid, or that plaintiff in error's alleged entry and survey had never appropriated the lands.

STATEMENT OF THE TITLE OF JOHN A. COAN.

The facts connected with the title of the plaintiff in error are as follows:

1st. A Virginia Military warrant exchange, No. 494, for five hundred acres, issued to Joseph, Sarah Ann and Margaret B. Gordon, children and heirs of Francis Gordon, a child and heir at law of John Gordon, the only heir of Thomas Gordon, a lieutenant of cavalry for three years in the Continental Line, Virginia Miltary Establishment, dated 16 June, 1840, found on page 31 of the Record.

2nd. An entry upon this of warrant 500 acres of land, dated December 18, 1849, No. 15,882, and being part of the same land in controversy, page 31, Record.

3rd. A survey, No. 15,882, following said entry including the land in controversy, dated April 10, 1851, made by D. F. Heaton, a deputy surveyor, and recorded December 23, 1851. Found on page 32 of the record.

4th. An assignment by Sarah Ann Dawson, *nee* Gordon, and one of the owners of the warrant, George H. Dawson, her husband, of one-fourth interest in the warrant to David F. Heaton, dated April 18, 1849.

5th. A like assignment by Joseph F. Gordon, Margaret R. Francis, *nee* Gordon, and Henry P. Francis, her husband, of one-fourth interest in the warrant to David F. Heaton, dated 16th May, 1849. Record, pp. 33 and 34.

6th. An assignment by Margaret R. Francis and husband, of

their entire interest in the warrant, being one-third, dated January 14, 1858, to David F. Heaton. Pp. 34 and 35, record.

7th. An assignment by Joseph F Gordon to David F. Heaton of his entire interest in the warrant 494 and survey 15,882, being one-third, dated January 14, 1858. Pg. 35 record.

8th. The evidence of Leonidas C. Heaton, executor of David F. Heaton and his son, to the effect that he had seen an assignment from George H. Dawson and Sarah Ann Dawson, his wife, one of the Gordon heirs named in the warrant, of their entire interest in the warrant to David F. Heaton, his father, in the latter's papers, but that the same had been lost and could not be found. Pp. 35. record.

9th. The record of the will of David F. Heaton probated in Scioto County, O., November 11, 1871. This will authorizes the executor, Leonidas C. Heaton, to sell and convey the real estate of which he died seized, and of which survey 15,882 was part. Pp. 36 and 37, record.

10th. A deed in fee simple from Leonidas C. Heaton, executor of David F. Heaton, for the north part of survey 15,882 being the same premises, was claimed by plaintiff in error, to David M. Elliott. Deed dated March 13, 1874, and recorded September 13, 1874. Pp. 38 and 39, record.

11th. A deed from David M. Elliott to John A. Coan, plaintiff in error, conveying the same premises herein by him claimed. Executed September 15, 1874, and recorded November 10, 1875. Pp. 40 and 41, record.

STATEMENT OF THE TITLE OF WILLIAM J. FLAGG.

The evidence of the title of the defendant in error to the lands in controversy was in substance as follows:

1st. A deed from the Trustees of the Ohio Agricultural and Mechanical College, to William J. Flagg, dated June 10, 1875, and recorded July 22, 1875. Pages 10 to 13 Record.

Plaintiff in error objected to the introduction of this deed in evidence as incompetent, without previous proof that the grantor in the

deed had before the execution of the same, complied with the requirements of the Legislature of Ohio, in an act passed April 3, 1873, accepting the cession of Virginia Military lands from the United States, but his objection was promptly overruled, as were all others made by him, and the deed was addmitted in evidence.

To further support his title, the defendant in error, Flagg, introduced evidence of the title to that part of survey 15,882, south of the line marked on the plat between pages 42 and 43 of the Record, as Coan's line, and which had no connection with the land in controversy except so far as it reflects on the question of the correctness of the boundry line in dispute.

To this evidence plaintiff in error objected as incompetent, but his objection was overruled and the evidence admitted. The evidence in question was,

2nd. A title bond from David F. Heaton to John A. Coan for 100 acres of land in this survey 15,882, but south of both the red and black lines in controversy across the survey. This title bond was dated February 1, 1854. Record, page 14.

3rd. On the same day John A. Coan sold and assigned one-half interest in this title bond to Joseph M. Smith. Page 14, Record.

4th. On May 10, 1854, Joseph M. Smith assigned his interest in this title bond to William J. Flagg, and

5th. On the same date John A. Coan assigned his interest in this title bond to William J. Flagg. Page 15, Record.

6th. On August 2, 1854, William J. Flagg assigned this title bond to Nicholas Longworth. Assignments endorsed on the bond. Page 15 Record.

7th. Then defendant in error introduced a deed for the southern of half this survey 15,882, not in controversy in this action, from David F. Heaton and wife to Nicholas Longworth, dated January 18, 1858. Plaintiff in error objected to the introduction of this deed as incompetent, but his objection was overruled and the deed admitted. Pp. 15 to 17, record.

8th. Defendant in error then offered in evidence item 12 of the

will of Nicholas Longworh, deceased, with item 2 of the first codicil thereto probated in Hamilton County, Ohio, February 17, 1863. The substance of this evidence was, as to the will, that the south half of survey 15,822 covered in said deed from David F. Heaton to Nicholas Longworth was devised to Joseph Longworth and Larz Anderson, in trust for his daughter, Eliza J. Flagg, wife of defendant in error, William J. Flagg, and by the codicil this land went to Eliza J. Flagg absolutely during her life, with power in her to dispose of the same by last will and testament. Pp. 18 to 20, record.

The foregoing embraced all the evidence offered by defendant in error directly in support of his title.

DANIEL M'CARTY'S DEPOSITION.

After plaintiff in error had completed the evidence of his title, defendant in error undertook to impeach the same by the deposition of Daniel McCarty, a clerk in the General Land Office in Washington, D. C., together with Exhibits A, B, C, D, E, F, and G thereto. Pp. 48 to 59, record.

The substance of the deposition and exhibits were as follows:

Witness had had charge of Division "H," relating to the Virginia Military District, since 1857. He said that all the *decisions* of the Commissioner of the General Land Office were contained in letters written by him to parties interested. He, McCarty, wrote the letters. Exhibit "A" was a letter from Willis Drummond, Commissioner, to James M. Trimble, of Hillsboro, O., dated December 23, 1872, acknowledging a receipt of a caveat against the issue of a patent on survey 15,882 on account of a surplus of 1,282 acres, and notifying him that patent would not issue till the excess was explained, or otherwise patent would not issue for over 400 acres. P. 52, record.

Exhibit "B" was a letter dated June 18, 1873, from W. W. Curtis, Acting Commissioner of the General Land Office, to L. C. Heaton, notifying him that on April 26, 1852, his testator had filed in the office for patent, survey 15,882, on Virginia Military warrant 494. That the application had been suspended for discrepancies in the manner of the assignments of the warrant, want of

proof of marriage, etc., also that James M. Trimble, of Hillsboro, Ohio, agent of the Ohio Agricultural and Mechanical College, had filed a caveat against the issuing of a patent on the ground of surplus, and had filed a sworn survey of the land made by Thomas Keyes, a surveyor, showing 1,682 acres in the survey, or a surplus of 1,282 acres; also notifying Heaton that the validity of the survey would not be recognized under the circumstances, and that unless he denied the facts, patent would be refused. P. 53, record.

Exhibit "C" was a letter dated July 11, 1873, from Willis Drummond, Commissioner, to L C. Heaton, notifying him that ninety days would be allowed him to substantiate his claims to survey 15,882. P. 54, record.

Exhibit "D" was a letter dated October 10, 1873, to L. C. Heaton, from Willis Drummond, Commissioner, to the effect that his application for survey 15,882 was rejected, Pp. 54 and 55, record.

Exhibit "E" was a letter dated October 29, 1873, from Willis Drummond, Commissioner, to L. C. Heaton, notifying him that the Department would take no further action in regard to survey 15,882. P. 55, record.

Exhibit "F" was a copy of the resurvey of Thomas Keyes. Pp. 56 and 57, record.

Exhibit "G" was a letter from Willis Drummond, Commissioner of the General Land Office, to David F. Heaton, dated October 26, 1871, recognizing the validity of survey 15,882, and urging him to complete the evidence so that patent could issue. P. 57 record, but not marked as Exhibit "G."

In addition to the foregoing there was attached to the deposition of McCarty, as an exhibit and marked Exhibit "G" in the record, but wrongly so, a letter from S. S. Burdott, Commissioner of the General Land Office, to William J. Flagg, dated October 2, 1875, in which he recognizes the validity of survey 15,882 for 500 acres. Page 58 and 59 Record.

These exhibits were attached at the instance of Flagg, with the exception of the two last, which were attached at the instance of Coan.

The plaintiff objected to the introduction of this deposition and the exhibits thereto as incompetant, but his exception was overruled and the evidence admitted.

The foregoing is the statement of the pleadings in the case and of the titles of the two parties introduced in support thereof.

HISTORY OF THE CASE IN THE OHIO COURTS.

The case was tried in the Court of Common Pleas of Scioto County, at its October Term thereof, 1876, and resulted in a decree for plaintiff, William J. Flagg, as prayed for by him. The defendant, Coan, appealed to the District Court of Scioto County, Ohio, and the case was there tried at its April Term, 1877, and resulted in a decree for the plaintiff, William J. Flagg. Thereupon the defendant, John A. Coan, prosecuted a petition in error in the Supreme Court of Ohio, against William J. Flagg, to reverse the judgment of the District Court of Scioto County, Ohio, and the same was heard at the January Term, 1882.

The Supreme Court of Ohio affirmed the judgment of the District Court of Scioto County, Ohio, and the case will be found reported in 38 Ohio State Reports, Coan vs. Flagg, Page 156.

The vital question in the whole case is;

IS THE ENTRY AND SURVEY MADE IN THE NAME OF THE HEIRS OF THOMAS GORDON VALID?

If the above question be determined affirmatively by this Court, then the judgment of the District Court of Scioto County, Ohio, and that of the Supreme Court of Ohio must be reversed.

Both parties claim under grants from the United States.

Coan's claim is founded on the Act of August 10, 1790, 2 Vol. U. S. Laws, page 179, and of the various acts of Congress passed to carry into effect that act. Of the various acts passed affecting the Virginia Military District of Ohio, and referred to in Fussell vs. Gregg, 113 U. S., 550, the only ones which need be examined as affecting Coan's title are the following: The second and third sections of the Act of May 20, 1826, Vol. 4, U. S. Statutes, page 189; section one of the act of July 7, 1838, Vol. 5, page 262; the act of August

19, 1841, Vol. 5, page 449; the act of July 5, 1848, Vol. 9, page 244, under which Coan's entry was made, and the act of February 20, 1850, Vol. 9, page 421, under which his survey was made.

Flagg claims under the act of February 18, 1871, General Statutes, Vol. 16, page 416, ceding the unsurveyed and unsold lands in the Virginia Military District in the State of Ohio, to that State, and the act of the Legislature of the State of Ohio, passed April 3, 1873, accepting the lands ceded to the State of Ohio by the act of Congress of the United States, approved February 18, 1871, and granting them to the Ohio Agricultural and Mechanical College, from whom Flagg obtained the deed already referred to in the statement of his title above.

If the entry and survey under which Coan claims, were valid and subsisting on the 18th day of February, 1871, when the gran to the State of Ohio, under which Flagg claims, took effect, then there is an end to Flagg's title. If the land was not then held by Coan's entry and survey, Flagg must prevail.

The legality of the warrant is not questioned, nor that of the entry. That the survey was made within the time prescribed by Congress, and properly returned to the Surveyor's office of the Virginia Military District, is not questioned. That the survey was returned to the General Land Office within the time prescribed by law is admitted by the pleadings. Coan in his answer alleges the survey was on file in the General Land Office for patent ever since December 26, 1851, and it is not denied in the reply, and the time of filing of the survey in the General Land Office was not contested in the case.

That the survey was made by a deputy surveyor in due form and manner is not questioned. That a computation of the calls of the survey, as recorded, will not show a surplus of over five per cent. is also established by the evidence of John B. Gregory, a surveyor, (at the close of his examination in chief. See page 42 of the printed record.) In fact the only objection to the validity of the survey is on account of the alleged surplus therein. The Commissioner of the General Land Office, the Common Pleas Court and District Court of Scioto County, Ohio, all decided this survey

invalid and void on account of the surplus therein, in face of the laws of Virginia, prior to the cession of the tract, and of the laws of Congress since, and contrary to the decisions of the courts of last resort in the States of Virginia and Kentucky and of the Supreme Court of the United States.

When Congress accepted the cession of the Virginia Military District from the State of Virginia, *in trust* for her soldiers of the Revolutionary War, in the Continental line, on March 1, 1874, it did so with all the laws of the State of Virginia previously enacted upon the subject of these lands and of the beneficiaries thereof, in ull force and effect as rules of property and to remain such until altered by Congress, and as conditions of, and limitations upon the grant. Consequently the act of May, 1879, Vol. 10 of Henning's Statutes of Virginia, page 51, was a law affecting these lands. Section 4 of the act provided that it should not be lawful for any person to enter for, survey, or take up any parcel of land held as surplus in any patent or grant, except in the lifetime of the patentee or grantee, and before any alienation shall have been made of the lands contained in such patent or grant, and until the party intending to take up the same should have given the patentee or grantee one full year's notice of such intention, and then the patentee or grantee was to have the preference in taking up the surplus with an additional grant, or he could have the quantity he was entitled to, surveyed to him within the original grant, leaving the surplus for the next taker. Penalties were also inflicted upon any who unjustly vexed the owner in possession, and it was provided that the patentee or grantee should have an allowance of five acres in every hundred for the variation of instruments.

This was the origin of the five per cent. rule as to surplus, and has ever since been observed by the Department of the Interior, in the General Land Office. This act is not cited as a rule of this property, at the time the entry and survey in question were made, but it was a rule of property in the Virginia Military District until May 20, 1826, when Congress enacted a law on the subject of surplus in the Virginia Military District, which has been in force since. This act is cited to show that Virginia did not permit surplus to vitiate a grant or survey. The act of Virginia of October,

1783. 11 Henning's Statutes, page 309, providing for the manner of surveying these lands and mentioning the territory between the Scioto and Little Miami river, northwest of the Ohio river, remained in force until February 24, 1829, Vol. 4, General Statutes, page 335, when Congress provided for the appointment of a surveyor for this District. On May 20,1826, Congress enacted a law on the subject of surplus in surveys in the Virginia Military District of Ohio, General Statutes Vol. 4, page 189, which is in force to this day. This law will be found in section 2 of that act which section has never been repealed.

Section 2 of this act of May 20, 1826, vol. 4, U. S. Laws, page 189, reads as follows:

"That no patent shall be issued by virtue of the preceding sections, for a greater quantity of land than the rank or term of service of the officer or soldier to whom, or to whose heirs or assigns, such warrant has been granted, would have entitled him to under the aforesaid laws of Virginia; and whenever it appears to the Secretary of War that the survey made by virtue of any of the aforesaid warrants is for a greater quantity of land than the soldier is entitled to for his services, the Secretary of War shall certify on each survey the amount of such surplus quantity, and the officer or soldier, his heirs or assigns, shall have leave to withdraw his survey from the office of the Secretary of War and resurvey his location, excluding such surplus quantity, in one body, from any part of his resurvey, and a patent shall issue upon such resurvey as in other cases."

This section clearly establishes that the validity of a survey is not affected on account of surplusage, and only gives the Commissioner of the General Land office the right to refuse to issue a patent until a resurvey, including only the correct quantity authorized by the warrant, is made.

The three Courts in Ohio, in deciding upon the validity of the survey as affected by the surplus, utterly ignored this section two of the act of May 20, 1826, as though no such law had ever been enacted. Congress legislated on the question of surplus in these surveys in the second section of the act of July 7, 1838, General Stat-

utes, vol. 5, p. 262, similarly to the second section of the act of May 20, 1826, and did not repeal that section, but on the third of March, 1839, repealed the second section of the act of July, 7, 1838, as we take it, because the second section of the act of May 20, 1826, was still in force. We therefore claim that the Courts of Ohio erred in not recognizing our survey valid to the extent of 400 acres of the warrant and for five per cent. surplus, and in not directing that we obtain that quantity in the manner pointed out in the second section of the act of May 20, 1826, and for this error, if for none others, the judgment of the Courts of Ohio, should be reversed.

THE PROVISO OF THE ACT OF MARCH 2, 1807, GENERAL STATUTES' VOL. 2, PAGE 424.

As the effect of this proviso, as re-enacted in every subsequent statute providing for locations in the Virginia Military District, was not passed upon in the case of Fussell vs. Hughes, 113 U. S., 550, we shall discuss its effect here as a defense of the title of Coan.

Under the proviso of 1807 a survey once made, no matter how informal, appropriated the land located and withdrew it from subsequent location.

So far as the defendant in error, Flagg, is concerned, since the cession of February 18, 1871, he cannot be regarded in any better light than a subsequent locator. We refer the court to the following cases in which the proviso of 1807 has been construed:

McArthur's heirs vs. Dunn's heirs, 7 Howard, 262.

Jackson vs. Clark & Ellison, 1 Peters, 628.

Galloway vs. Finley, 12 Peters; 264.

Parker vs. Wallace, 3 Ohio, 490.

Stubblefield vs. Baggs, 2 Ohio State, 217.

Thomas vs. White, 2 Ohio State, 540.

Price vs. Johnston, 1 O. S,, 394. In this case, in quoting Justice McLean's opinion in Lindsey vs. Miller, 6 Peters, 666, there is an error in the printer on page 394, which makes Justice McLean say the contrary to what he actually decided. The quotation

reads in Price vs. Johnston, "There can be no doubt that Congress did (not) intend to protect surveys which had been irregularly made, etc." The word *not*, in brackets, is not in Justice McLean's opinion.

McArthur's heirs vs. Gallaher, 8 O., 515.

The Supreme Court of Ohio in this case held that because the survey contained a large surplus, it was for that reason utterly invalid and vested in the owner of the survey no estate or interest in the land which the government of the United States was bound to protect by issuing a patent for the whole or any part of the survey.

We propose to take the broad ground that

A SURPLUS DOES NOT VITIATE A SURVEY.

The Supreme Court of the United States thoroughly considered and directly passed on the question in the case of Taylor vs. Brown, 5 Cranch, 249, 250, 251 and 253, and there following the doctrine and rules in Beckley vs. Bryan and Ransdale, Sneed's Kentucky Cases, 107, and Johnson vs. Buffington, 2 Washington, 116, held that surplusage did not vitiate or render a survey invalid. This case was decided at the February term, 1809. It is valuable as showing that at time the old Virginia law of May, 1779, heretofore cited, respecting surplus was held to be in force, and that its provisions governed cases of this character. This question arose before the court at a time when the attention of the public had been fully directed to this question of surplus, and the court says:

"No case exists, so far as the court is informed, in which, on a *caveat*, the quantity of land in the survey of the plaintiff or defendant has been considered as affecting the title, upon the single principle of surplus. Yet the fact must have often occured."

The court goes on to show that these were the decisions of the courts of Kentucky and of Virginia both subsequent and prior to the Revolution, and cites precedents and cases. Those precedents have since been repeatedly followed by the same court, those of Kentucky and the State of Ohio.

In Holmes vs. Trout, 7 Peters, page 208, a case going from Kentucky, the court says: "It has long been a settled principle in

Kentucky, that surplus land in a survey does not vitiate it; and such a survey was held to be made conformable to entry."

Saum vs. Latham, Wright's Reports, 309, decides that surplus in a survey is not subject to appropriation by a subsequent locator.

Gill vs. Towler, 2 Ohio, 209, was decided in 1827.

There the Court says, "The error of a surveyor in placing his corners at a greater distance from each other than he intended, or in placing them somewhat out of the course he is calling for, so as to make an entry, by a survey of the ground, including too much land has never been considered as affecting the location; if it did, by far the largest number of entries in the district would be void."

* * * * * * * * *

"The defendant does not pretend that those surveys are injured by their surplus. But why not? It is because it appears of record that the owners preferred to take the quantity they were respectively entitled to, and no more; and because we are bound to attribute the variance, or excess, to the ordinary inaccuracy of measuring through a forest."

In this connection we desire to call the attention of the Court to the fact that there was no authority of law for the resurvey of Thomas Keyes ascertaining surplus; that it was made without any notice to owners of the survey at the time made.

Moreover, in Gill vs. Towler, 2 O., 210, the Court says that "the legality of the entry must be determined by the courses and distances as found on record, and not by the remeasurement of the ground."

* * * * * * * * *

"We do not distinguish between a call for course and distance, ascertained by the locator who makes the call, and a call for the recorded course and distance of an existing survey as ascertained by a former locator. In either case, the validity of the location, as far as quantity affects it, must be ascertained by the calls, and not by remeasurement."

The obvious justice of this rule will be apparent in this case, for the reason that the lines and corners of this survey 15,882 were, except upon the north, lines and corners of older surveys. See testimony of Captain Barton, p. 25 of the Record.

The plaintiff in error objected to the testimony of Joseph M. Smith, a surveyor, in testifying that he made a remeasurement of the survey and found a surplus of 1,302 acres (Record, page 23,) but the District Court, disregarding the authority of Gill vs. Towler, 2 O., 210, before recited, overruled the objection and admitted the evidence.

In making this survey the Deputy Surveyor of the United States for the District was governed by the corners, courses and distances of surrounding surveys. If these were erroneous, is our survey for that reason invalid? If so, then this question might be investigated from one adjoining survey to another, until the surplus of every survey in the district, patented or otherwise, should be ascertained.

The most that the authorities representing the college have ever claimed is that under the cession of February 18, 1871, it is entitled to the surplus in existing unpatented surveys; but in this case the District Court, utterly disregarding the rights of the owner of the survey, has given the whole of it to the college's grantee, on account of surplus. On the contrary the Commissioner of the General Land Office, in his alleged *decisions*, has uniformly recognized the validity of the survey to the extent of the 500 acres covered by the warrant. See his statement in Exhibit "A" to Daniel McCarty's deposition, Record, p. 52. See also his letter of date October 2, 1875, to William J. Flagg, on page 59 of the Record, in which he states that the survey was irregular only beyond 500 acres, the amount called for in the warrant, thus clearly admitting its regularity for 500 acres, the number called for in the location.

In the same letter he promises to notify Flagg of further application for patent, evidently considering that the owner of the survey had a right to apply for patent for the number of acres he could properly locate.

We claim that under the construction given by the courts to

the proviso of 1807, all lands in the district covered by irregular and defective surveys were as much withdrawn from subsequent location as if covered by regular and valid surveys duly carried into patent. That the term "unsurveyed and unsold lands," as used in the act of February 18, 1871, in view of the construction given by the courts to the proviso of 1807, must exclude any and all surveys and appropriations under Virginia Military warrants, and that to give the State of Ohio or its assigns any right or title in the irregular surveys, would require a subsequent act of Congress expressly conveying title to this class of surveys, or to the surplus therein, and there being no such subsequent grant, defendant in error has not, never had, and can not have any title to the lands conveyed by this survey. If this position is correct there is an end of the case, and the judgment of the District Court must be reversed.

But for the sake of the argument, let us for a moment admit that the act of February 18, 1871, must be construed so as to give the surplus in unpatented surveys to the college, what, then, should the District Court have done? It should either have permitted the owner of the survey to have resurveyed his location under the old statute of Virginia of May, 1779, prior to the cession to the United States, and gotten his quanity, excluding the surplus, or it should have held his location valid for the number of acres in his warrant and allowed him time to have made a resurvey, gotten his exact quantity and excluded the surplus under the act of May 20, 1826, vol. 4 U. S. Laws, page 189.

It failed to do this, and for this reason, if for none other, the judgment of the District Court should be reversed.

THE DEPOSITION OF DANIEL MCARTY WITH ITS EXHIBITS.

The Courts of Ohio decided Coan's survey was invalid and void on account of the surplus land therein, and they based their decisions to that effect upon the alleged evidence contained in the deposition of Daniel McCarty, with the exhibits thereto. The plaintiff in error insisted in each of the Ohio Courts that the deposition of Daniel McCarty and its exhibits was utterly incompetent as evidence, and in this court is insisting that the courts below erred in admitting it in evidence, and in considering it. Take this deposition out of the case and there is no other evidence of any surplus

left, or in the case, and therefore nothing to support the judgments of the Ohio Courts, except the evidence of Joseph M. Smith, and that is incompetent because survey disclosing surplus was made without notice to Coan, and because he does not exclude the quantities of older surveys embraced in the boundaries calculated by him. The theory of the defendant in error is that the land in question passed to the State of Ohio, from the United States by the cession of February 18, 1871. And if this be true then the action of the Commissioner of the General Land Office, as shown in the letters made exhibits to Daniel McCarty's deposition, was a nullity, as the United States had no interest in the land to be the subject matter of a decision by the Commissioner.

The only remaining proposition to which the defendant in error is driven is that the title to the land was in the United States at the time of the decision of the Commissioner, and that by his decision he changed the title from the United States to the State of Ohio. This proposition is absurd upon its face, as the Commissioner possessed no power or functions, which, by his own act, would enable him to transfer title. Either the title passed under the cesssion of February 18, 1871, or it is still in the United States, in trust for the owner of the survey.

If, for the sake of the argument, it be admitted that the cession of February, 1871, conveyed this land to the State of Ohio, and with the decision of the Commissioner was equivalent to a patent, which we think the court can not find in any event, yet the equities of the owner of the survey can be asserted and protected,

Marquez vs. Frisbie, 11 Otto, 473.

Johnson vs. Tousley, 13 Wallace, 73.

Bird vs. Ward, 1 Missouri, 398.

Shepley vs. Cowan, 91 U. S., 330.

Danforth vs. Monical, 84 Ill., 456.

These cases are to the effect that notwithstanding the proper officers of the United States have acted, and patents to lands have issued, yet the equity of any third party may be protected and the holder of the land title by patent may be decreed to hold in trust

for one having equities prior to the issuing of the patent. While we do not think there is any call for the adminstration of this principle in this case, yet out of extreme caution we have referred to the doctrine. The case last above referred to goes to the extent that the decisions of the Register and Receiver of the United States Land Office are not conclusive on the rights of individuals.

There is a grave question in this case as to what authority the Commissioner of the General Land Office has over entries and surveys in the Virginia Military District. It may be claimed that the Statutes creating his office and defining its powers and duties, govern him in his duties in relation to entries and surveys in the Virginia Military District of Ohio, but we claim that the general laws defining his powers and duties give him no authority over entries and surveys in the Virginia Military District. We claim that in respect to lands in the Virginia Military District, he has no powers except to retain custody of such papers as may be sent him, and to issue patents upon surveys when the warrant, entry and survey, in any case, are regular upon their faces, and to refuse patent when they are not, and until they be made so, and in doing this he merely acts as an agent for the President of the United States, under the law of Congress of August 10, 1790, 2 U. S. Laws, p. 179. In other words, we claim the Commissioner has no powers in respect to the Virginia Military District, except such as can be derived from, or found in the Statutes of Virginia, prior to the cession, and of the United States since, upon the subject of this district. If we are correct in this theory, then all the Commissioner of the General Land Office, had power to do in this case was to receive and preserve the warrant, entry and survey, which were forwarded to him, together with evidence of assignment of the warrant, to see that these papers were all regular and if so, to prepare the patent, have it signed and forwarded to the owner of the survey.

In this case, taking the assignments of the warrant to be regular, the Commissioner on examining the survey forwarded would have found that a computation of its contents did not show a surplus of over five per cent allowed by the laws of Virginia, (see evidence of John B. Gregory, a surveyor, as to computation of the contents of the survey, p. 42 of the record) and should have issued

a patent, leaving any question of surplus to be settled on the application of some subsequent locator. The most authority the Commissioner of the Land Office had was to refuse to issue the patent and such refusal we claim cannot have the legal effect to invalidate and render void the entry and survey, or to extinguish the rights of the owner of such entry and survey, or operate to place the title in the party claiming under the second grant from the United States. But if this Court should take the view that in respect to lands in the Virginia Military District the Commissioner of the General Land Office was governed by the General Laws as to his office, we also refer to the statutes of the United States, sections 2,447 and 2,455, Revised Statutes. Section 2,450 provides in wha t manner the Commioner of General Land Office shall decide upon unpatented entries and adjudge in what cases he shall issue patents. Section 2,451 provides that every such adjudication shall be approved by the Secretary of the Interior and Attorney General, acting as a Board, and shall operate only to divest the United States of the title of the lands embraced thereby, without prejudice to the rights of conflicting claimants.

The latter clause was inserted in the statutes to conform to the decisions of the Supreme Court and courts of the last resort in the several States, of the tenor before referred to.

Brush vs. Ware, 15 Peters, 107.

So in case the defendant in error relies upon the decision of the Commissioner as equivalent to a grant by the United States to him, in what better condition is he against the prior equity of the owner of the survey than he was before?

Now as to the McCarty deposition and its exhibits, we desire to call the attentian of the Court to some objections.

1st. Daniel McCarty was not in charge of, and did not have the custody of, the alleged records he testifies about, at the time he gave his deposition. He was then discharged from and out of employment of the Land Office, and was called in just as any stranger might have been. Why the deposition of the actual custodian of the books was not taken does not appear. The Court can make its own inferences why a lawyer in private practice in Washington, D.

C., was called as a witness when the custodian of the books should have been. Then all McCarty's talk as to manner of business in the General Land Office is certainly incompetent. If there are any records in that office required by law to be kept, exemplifications of them should have been produced. As to his statement of results from an examination of the records, that kind of evidence is only competent as coming from the legal custodian of the records. Polk's lessees vs. Wendell, 5 Wheaton, pp. 293, 310 & 311.

We have been unable to find any law of the United States requiring the Commissioner of the General Land Office to record copies of letters sent to parties, in regard to the business of the office and making such copies public records, and in the absence of such law, such copies are but private memoranda of the office and are not competent evidence. Griffin vs. Reynolds, 17 Howard, 611; Lyell vs. Maynard, 4 McLean, 15; James vs. Gordon, 1 Washington, 33.

On what principle can the letter of December 23, 1872, by the Commissioner to Trimble, "Exhibit A," be admitted in evidence? Is plaintiff in error to be bound and his title affected by anything the Commissioner of the General Land Office might see fit to write to Trimble? And why is plaintiff here to be bound by the letter of the Commissioner to Trimble, when it is but *a part* of the correspondence? Why was the letter of Trimble to which it was an answer, suppressed?

As to "Exhibit B," letter of the Commissioner to L. C. Heator of June 18, 1873. Here the Commissioner opens the correspondence and tells Heaton of the ex-parte resurvey of Thomas Keyes, and that upon such evidence his claim for patent is rejected. The substance of this letter, speaking for the Commissioner, is that Trimble has filed an indictment against you, upon which I have, without notice to you, tried you and found you guilty, and I will now give you 90 days in which to prove yourself innocent before sentence of law will be carried into execution. Letter "Exhibit C" is a reply to a letter from L. C. Heaton, but Heaton's letter is not produced.

On October 10, 1873, the Commissioner of the General Land

Office has another deliverance for Heaton, in which he tells him that on the 18th of June last (1873), before he had ever had a hearing, he had upon ex-parte evidence, rejected his application for patent, and the same is now final. Was there ever such a travesty upon justice? Again in the letter of Oct. 29, 1873, (Exhibit E) by the Commissioner to Heaton in answer to one from Heaton, he states the application for patent was rejected June 18, 1873, at a time when Heaton had had no notice of the ex-parte resurvey, and had had no opportunity to be heard.

Exhibit F is the resurvey made by Thomas Keyes, December 12, 1872. There was no authority of law for making this resurvey. It was made without any notice to Heaton, then owner of the entry and survey, and the surveyor, Thomas Keyes, was drunk when he made it, as is most explicitly and unqualifiedly testified to by Solomon B. McCall, a witness for plaintiff, whose evidence to that effect, uncontradicted, will be found on page 43 of the record of this case Uupn this ex-parte action of a drunken surveyor, without an opportunity to be present at the survey, and without any notice to Heaton, or any opportunity to be heard, his application for patent was rejected. The basis of the action of the Commissioner was without any authority of law, ex-parte, and therefore his decision is void, and for that reasons incompetent in evidence. In no state in the Union is there any provision for a survey of lands, by which a party in interest therein is to be affected, which does not provide that the party shall have notice and an opportunity to be present and heard. Moreover Heaton was not bound to notice any resurvey not made under any provisions of law, and it was to his credit and honor that he took no notice of it.

As to the two letters introduced by plaintiff here, we claim nothing for them except that on Oct. 26, 1871, the Commissioner of the General Land Office, admitted the validity of the survey, and that of Oct. 2, 1875, by Commissioner Burdott to Flagg, defendant here, in which he admitted the surveys were good for the number of acres named in the warrant. Another objection to the letters referred to as exhibits, is that, if they are a record, certificates to the same do not show, that they are the entire record of the proceedings in the Land Office as to this survey. If a record

be evidence, it must be the entire record introduced and not portions. James vs. Gordon, 1 Washington, 333. Gifford vs. Tunckhouser, Peters' Circuit Court Report, 418.

The letters show that only a part of the correspondence is given, and the letters introduced are copies of copies, which are never evidence. Wynn vs. Patterson, 9 Peters, 663. Best on Evidence, vol. 2, page 485.

As to this deposition we have this state of facts. Flagg procures an attorney in Washington, who claims to be familiar with the documents and books in Division H of the Land Office, to go into the office and give his deposition there. This attorney of Flagg, culls over retained copies of letters of the Commissioner, to different parties, selects such as will suit his purpose, and without producing the letters of the parties to which they were answers, and which were undoubtedly in the office, presents such as he chooses in evidence and produces a resurvey made without any notice and without the sanction of law, and parades these documents, with McCarty's general statement of the practice of the office as a decision of the Commissioner of the General Land Office invalidating the title of Coan. The Ohio Courts accepted this deposition as evidence, and upon the authority of it decided the title of John A. Coan, invalid and void.

If there was ever anything more outrageous done in the Court of Star Chamber in the inglorious reign of Charles the First, we do not now recall it.

It would be well in this connection, in examining the so called decision of the Land Office, to notice what the Commissioner of the General Land Office has to say of his own functions, whether they be judicial or ministerial.

The Commissioner, in his report for the year 1876, on pages 56, 57 and 58, speaking of unpatented lands in the Virginia Military District, of surplus therein and of the claims of the Ohio Agricullural and Mechanical College thereto, says:

VIRGINIA MILITARY DISTRICT, OHIO.

This district lying between the Little Miami and Scioto rivers, north-

west of the river Ohio, and estimated to contain some four million acres, was reserved by Virginia from the cession of 1783-'84 to the United States, of what is known as the Northwestern Terrritory, for the purpose of satisfying the warrants issued or to be issued to the officers and soldiers of the Continental Line of said State, for services rendered during the war of the Revolution.

Three patents for 259 2-3 acres of land in said district have been issued, and the number of claims therefor is 61, calling for 13,441 2-3 acres, all which have been and continue suspended on account either of caveats filed against the satisfaction thereof, defects in the chain of title or heirship, or for the reason that the surveys contain a large excess of land over and above the quantity called for by the warrants in virtue of which the same purport to have been made.

On the 18th of February, 1871, Congress, by an act entitled "An act to cede to the State of Ohio the unsold lands in the Virginia Military District in said State," made provision that the lands remaining unsurveyed and unsold in said district be, and they are declared by said act to be thereby, ceded to the State of Ohio upon certain specified conditions. These lands were soon thereafter ceded to the Ohio Agricultural and Mechanical College by act of the Legislature of said State, official evidence of which is on file in this office.

It is estimated from such data as are attainable that between twenty thousand and thirty thousand acres of land in said district, apportioned among several hundred surveys, are still outstanding and unsatisfied, never having been returned to this office to be carried into patent; and efforts are now being made by parties acting as attorneys for claimants to have the same filed and patented.

The college above named contends that these unpatented surveys for the most part call for a large excess in the area of land actually included therein beyond the amount specified in the warrants upon which the same were made, and have produced satisfactory evidence in several cases showing by resurveys made upon the ground by competent civil engineers, and verified by their respective oaths, that such excess of land often amounts to from 50 to 500 per cent. over and above the area called for by the warrants in virtue of which such surveys purport to have been made.

It is further insisted by said college that all surveys should have been legally made, that is, for the precise amount called for by the warrants applied thereto; that by law no patent can be legally issued, where the fact is known, for any greater amount of land than is set forth in the warrant, and that therefore all such excess is really "unsurveyed" land, and, as such, the property of the college within the true intent and

meaning of the said cession by Congress to the State of Ohio and that of the said State to the said institution, as above mentioned.

On the other hand, it is claimed by the owners of such surveys that the act of issuing patents thereon is purely a ministerial duty; that the Commissioner of the Land Office must act from the face of the papers presented, and can exercise no judgment upon the subject except as regards matters of form, and that patents are justly due for the lands called for by the surveys to the persons apparently entitled thereto.

The questions involved arose while Hon. Willis Drummond was Commissioner, who, upon full and careful examination of the subject-matter, decided that, while in the issue of the patents in question this office merely acted ministerially, and upon the face of the papers pronounced, and had no power or authority to determine the question of title to any excess of land in the said surveys, yet it was the manifest duty thereof, upon general principles of right and justice, to withhold the issue of patents until the matters in controversy were settled either by a legislative interpretation of the said cession of 1871, or by proper and competent judicial decision. He accordingly declined to issue patents in the cases of surveys involving any considerable excess, first giving the parties in interest full opportunity to be heard before the office, and after such declension was made, the usual sixty days in which to take an appeal to the Department. No appeal was ever made.

My immediate predecessor, Hon. S. S. Burdett, concurred in these views, and I see no good or sufficient reasons to change the actions had in the matter.

If it shall be decided in either of the methods above indicated that the excess in any unpatented survey is legally the property of said college, I would then recommend that, in all cases where the fact of such excess is established to the satisfaction of this office, that authority be given by law to the surveyor of the said military district to make at the the expense of the parties in interest, a resurvey of the lands claimed, excluding the excess in one body from any such part of the original survey as may be desired by the present proprietors thereof; and that a patent shal issue upon such resurvey as in other cases. This will leave the residue of said lands as the property of the institution in question

If, however, it is determined that the surveys made are to be held as legal and valid so far as the locators thereof are concerned, and that the cession of 1871 had no reference to lands which were included in any survey, and that the patents must follow the same so far as the description of land is concerned, then the difficulty in the case will be removed, and all other requirements being satisfactorily answered, said surveys can be duly carried into patent.

It is proper to add in this connection that the surveyor of said district had by law no power or authority to make any surveys therein after March 3, 1857.

I am duly advised that the college in question designs to make resurveys of all the unpatented lands embraced in outstanding surveys, and expects to complete and file the evidence thereof by the first of January next.

This will serve to show that the Commissioner regarded himself only as a ministerial officer, and not a judicial one. That he is to be considered only a ministerial officer and without any judicial functions, has been repeatedly decided by the courts.

How Congress regards these entries and surveys may be seen by the act of May 27, 1880, sect. 2 G. L., vol 21, p. 142.

As to the construction of the grant of February 18, 1871, by Congress to the State of Ohio, that remains for the courts, and the Court of Common Pleas and District Court of Scioto county and the Supreme Court of Ohio, instead of depending on the *ex parte* statement contained in the letters of the Commissioner of the General Land Office, and deciding the case on the authority of these statements alone, as they did, ought to have decided it on the merits of the entry and survey and the evidence of the ownership thereof. Had these courts sought to have determined the validity of the entry and survey on their own merits, instead of on the declarations of the Commissioner of the General Land Office, they could have found mines of judicial learning to have guided them to a correct decision. Had they followed the grand beacons of judicial authority scattered all along the course of years from 1807 down to the present time, instead of the farthing rush-light of Daniel McCarty, we would have had no cause of complaint in this court to-day.

In the case of the Dubuque & Pacific Railroad vs. Litchfield, 23 Howard 86, this Court has said (in a case like this) "that the title to neither party can be affected by proceedings in the Land Office, or by the opinions of the executive department, but that the claims of the parties under the two acts of Congress, must be determined by the construction to be given to those acts. This we are required to do in deciding this cause."

The decision of the Court in this case will depend, to a great extent, on the construction of the act of February 18, 1871.

We shall discuss it at this point, and we give the act verbatim.

THE ACT OF FEBRUARY, 18, 1871.

"An act to cede to the State of Ohio the unsold lands in the Virginia Military District.

"*Be it enacted by the Senate and House of Representatives of the United States in Congress assembled*, That the lands remaining unsurveyed and unsold in the Virginia Military District, in the State of Ohio, be, and the same are hereby, ceded to the State of Ohio, upon the conditions following, to wit: Any person who, at the time of the passage of this act, is a *bona fide* settler on any portion of said land, may hold not exceeding one hundred and sixty acres so by him occupied, by his preempting the same in such manner as the Legislature of the State of Ohio may direct.

"Approved February 18, 1871."

The word "unsold," as used in this act, was utterly inappropriate. Not a foot of ground in this district was ever sold in the first instance, but it was all given away in military bounties. Had the term "unappropriated" been used it would have been strictly correct. Doubtless the framer of the bill had in his mind other land districts in which Congress sold its lands. We think the court in passing upon this statute must necessarily construe the word "unsold" as though it read "unappropriated." Let it be given such construction, and under the construction given by the courts to the proviso of the act of March 2, 1807, all surveyed land, regardless as to the validitity of the entry or survey, has been withdrawn from subsequent location, and as to all after claimants becomes the same as surveyed and sold land, and is not within the terms of the act of cession of February 18, 1871.

In construing the words "unsurveyed" and "unsold," the court will take into consideration the intention of Congress, the effect the act will have upon titles and the object of the grant. Did it intend to convey to the State the surplus included in unpatented surveys, as well as the unsurveyed and unsold lands?

The reasons stated for the passage of the act, as shown by the

the highest resort in Virginia, Kentucky and Ohio, and the Supreme Court of the United States, construing the proviso of 1807. It overlooked the fact that the Commissioner of the General Land Office is a mere ministerial officer and clothed with no judicial functions. It further overlooked the fact that he stated in his letters that the survey was perfectly good for the number of acres named in the warrant, and it was only on the account of the surplus that the patent was refused. It further overlooked the fact that instead of following the *dicta* of the Commissioner as a guide, it ought to have decided the question for itself, independent of his action. Ever since the settlement of this country and the establishment of courts, it has been considered their function to determine between different entries and surveys, and the Commissioner of the General Land Office has been guided by these decisions uniformly. If the owner of an unpatented survey could get the smallest 6 by 8 court in the United States to decide in his favor against a conflicting survey, all he had to do was to send an exemplified copy of the decree to the Commissioner of the General Land Office and the Commissioner would issue a patent in accordance with the decree. In this case the Commissioner "should have" refused patent, leaving it to the parties to have their claims determined by the proper Court of Scioto County. That Court, instead of determining the question by the flood of judicial light it might have had, simply followed the action of the Commissioner of the General Land Office, supposing it to be cconclusive.

Another matter that may be looked at in the construction of the act of February 18, 1871, is this: is it to be presumed that Congress intended to place the owners of unpatented surveys, having surplus, at the mercy of the Land Office Commissioner, prompted by the greedy agents of the college, when that body undertook to protect the illegal interests of squatters and trespassers who had no shadow of title or equities in the premises, no claims upon the government, and who were violating the laws? Yet as against the State of Ohio and its grantee, the college, is reserved the right of a *bona fide* settler at the passage of the act to preempt 160 acres in such manner as the State might prescribe. Does it not seem reasonable that if Congress were so tender of the *rights* (?) of squatters, who had no claim on it, that it intended to give the Commissioner

of the Generel Land Office and the college, power to wrest from the owners of unpatented surveys containing a surplus, the lands for which they held equitable titles, for which they and their grantors had paid a valuable consideration, and place them in a worse condition than the squatters who had no rights, and still were allowed to preempt 160 acres?

THE SCRIP LAW OF 1852.

It may be claimed that the owner of the survey is not prejudiced by the action of the Commissioner and the lower courts; that he could surrender his entry, procure land scrip of the United States and locate land elsewhere.

Act of 31st of August, 1852, 10 Statutes, p. 143.

This statute does not apply, for the reason that at the passage of that act the warrant in this case was not an "unsatisfied outstanding warrant," for which relief was provided in the statute, but had been satisfied by being located.

Should the owner of the survey undertake to procure the scrip referred to in this act he would be met by this objection by the Commissioner of the General Land Office. This act has a proviso to the effect that it should be taken as a full and final adjustment of all bounty land claims to the officers and soldiers, seamen and marines, of the State of Virginia, for services in the War of the Revolution, on condition that the State of Virginia should, by proper act of the Legislature thereof, relinquish all claims to the lands in the Virginia Military Land District of the State of Ohio. This clearly shows that Congress, at that time, still recognized the trust in favor of the Virginia officers and soldiers.

There is another answer to this question still more forcible.

Section 3 of the act of May 20, 1826, 4 Statutes U. S., p. 189, provides "that no holder of any warrant which has been or may be located, shall be permitted to withdraw or remove the same and locate it in any other land, except in cases of eviction, in consequence of a legal judgement first obtained, from the whole or a part of the located land, or unless it be found to interfere with a location or survey.

Hence the locator is bound to hold his location.

A sufficient answer to this objection, however, is that the locator is not bound to give up his location, and his assignee does not desire to do so.

THE ACTS OF MAY 28, 1880, VOL. 21, PAGE 142, AND OF AUG. 7, 1882, 1ST. SESSION 47 CONGRESS, PAGE 348 — CONSIDERED IN RELATION TO THE ORIGINAL ACT OF CESSION OF FEBRUARY 18, 1871.

Under the act of May 28, 1880. passed five years subsequent to the institution of this suit, the Supreme Court of Ohio held that the 4th section ratified the title of Flagg conveyed to him by the College. While we deny the correctness of this judgment, for the sake of illustration, we will concede its correctness. It amounts simply to this, Flagg acquired no title by the deed from the College under the original grant, but the 4th section of the act of May, 27, 1880, was a new grant and of its self confirmed and ratified his title. If that be the case then the act of August 7, 1882, took away Flagg's title and gave the land to Coan. The act of August 7, 1882, was intended to cover and apply to just such titles as that of Coan, and repealed so much of the act of February 18, 1871, and May 27, 1880, as conflicted with its terms, and thereby the 4th section of the act of May 27, 1880, giving Flagg a title, was repealed. If the act of May 27, 1880, gave Flagg anything, it was a free gift on the part of Congress and a gift it could rescind and did rescind before the rights of any innocent or third parties intervened. That Congress could constitutionally enact such repeal has been decided in Rice vs. The Minnesota & Northwestern Railroad Company, 1 Black 369. But the claim we make in this case is that the lands in question did not pass to the State of Ohio, under the act of February 18, 1871, but was reserved as a part of the surveyed and sold lands, which by the terms of that act were reserved to the United States, and being so reserved that the title of Coan was made good and confirmed both by the acts of May 27, 1880, and August 7, 1882.

We claim that the only construction that can properly be given to the 4th section of the act of May 7, 1880, so long as it remained in force, was that as to the class of lands therein mentioned. Congress intended the titles should depend on the original act of cession of February 18, 1871, unaffected the act of May 27, 1880.

Certainly it cannot be presumed that Congress intended in case lands had been wrongfully taken up and sold by the College, to rob the former proprietor of his land and give it to the vendee of the College. Suppose the College had prior to the act of May 27, 1880. sold and conveyed for a valuable consideration, every unpatented survey in the District, no matter how long held and owned by innocent parties would it be claimed that the 4th section of the act of May 27, 1880, therefore ratified every such sale? We think not, and such a view of the 4th section of the act of May 27, 1880, is so repugnant to the commonest notions of justice, that the mere statement of it is revolting to the judicial mind. Judge White of the Supreme Court of Ohio dissented from the remainder of the Court on that proposition. The act of August 7, 1882, sufficiently indicates that Congress had no such intention in passing the act of May 7, 1880. The act of February 18, 1871, must be construed most strictly against the grantee, the State of Ohio.

If there is any doubt as to what passed by that act, the grant must be construed most favorably to the reservation by the United States.

In grants by the public nothing passes by implication. Charles River Bridge vs. Warren Bridge 11 Peters, 546. All grants of this description are strictly construed against the grantees; nothing whatever passes but what is conveyed in clear and explicit language, etc. Dubuque and Pacific Railroad Co. vs. Litchfield 23. Howard, 88.

In a grant like this the rule is that if the meaning of the words be doubtful, they shall be taken most strongly against the grantee, and for the government. Mills vs. St. Clair Co., 8 Howard, 581.

In this grant there was a reservation of the surveyed and appropriated lands. The case of Wilcox vs. Jackson, 13 Peters 513, is similar in principle to this. and there the Court says:

"But we go further, and say that, whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law, or proclamation, or sale would be construed to embrace it, or to operate on it,

although no reservation were made of it." The foregoing language quoted from Jackson vs. Wilcox, supra, is quoted and cited with approval in case of Leavenworth, Lawrence & Galveston R. R. Co, vs. the United States, 92 U. S., 745.

We have based our title on the exception in the Act of Feb., 18, 1871, on the theory that the land we claim was surveyed and sold land, and did not pass to the State of Ohio, by that act of cession. If we are correct in this position our title is and will be unaffected by the 4th. section of the act of May 27, 1880, and the Supreme Court of Ohio erred in the construction it gave that act.

As to the act of August 7, 1882, which has never yet been before this Court for construction, we claim that in view of the evidence herein, it ratifies and confirms our title, and expressly repeals all of the act of February, 18, 1871, and of May, 27 1880, in conflict with its terms. We call attention to one particular in which we claim that the act of May 27, 1880, affects our title. We claim that the second section validates our entry and survey as against any objections which could be raised to it, as to the date of its return to the General Land Office at Washington, and we quote the second section entire.

"Section 2. That all legal surveys returned to the Land Office on or before March 3, 1857, on entries made before January, 1, 1852, and founded on unsatisfied Virginia Military continental warrants, are hereby declared valid."

THE SUSTAINING OF THE DEMURRER TO THE SIXTH DEFENSE.

Being in possession and claiming title to the land, it seems to us that Coan should have been permitted to show that Flagg's college deed was void, in order to remove a cloud from his, Coan's, title.

Or even if the college had title, under the sixth defense Coan should have been permitted to show that for want of compliance with the act of the Legislature of Ohio of April 3, 1873, respecting sales of college lands, the deed was void and conveyed no title.

THE DISPUTED SOUTHERN BOUNDARY.

A reference to the plat bound in with the record between pages

66 and 67, will show the difference between the parties as to boundary. The black line running from the three black oaks northwest corner of survey 14,304, to the hickory and hornbeam northeast corner of survey 15,771, is the one claimed by Coan. The red line running directly west from the three black oaks to the west side of the survey is the one claimed by Flagg. The call for this line in the deed of David F. Heaton and wife to Nicholas Longworth is "from the northwesterly corner of McCall's survey 14,304, west 330 poles to a hickory and hornbeam on side of a hill, most easterly corner to William McCall's survey 15,771." (Record, page 27.)

The call in the deed of Leonidas C. Heaton to David M. Elliott for this line is "from three black oaks on top of ridge northwest corner to survey 14,304, south 73 degrees, 25 minutes west 316 poles, crossing several branches and ridges to a stone on the west bank of ravine, 10 poles north of a branch of Dog Hollow, in place of hickory and hornbeam east corner of survey 15,771."

The evidence shows that the true course of the line is as given in Leonidas C. Heaton's deed to David M. Elliott. The point of the controversy is that valuable stone quarries lie between the disputed lines. The Coan line, from the three black oaks to the hickory and hornbeam, is from monument to monument; that from the three black oaks 330 poles west is according to course alone, and finds no monument at its western limit

The law in case of a conflict of this character is too plain to admit of an argument. Course and distance must yield to natutal and artificial monuments.

Hence, if the Court find the title of the northern portion of the survey to be in Coan's, it must find the southern line as claimed by him.

Nash vs. Atherson, 10 Ohio, 167.

Calhoun vs. Price, 17 Ohio State, 100.

CHARLES & WM. B. KING,
916 F Street, Washington, D. C.
N. W. EVANS and
HON. A. C. THOMPSON, of
Portsmouth, Ohio,
Solicitors for Complainants.

January 22, 1887.

ADDENDA.

Since the preparation of this argument as above our attention has been called to two cases which we desire to cite to the Court.

The first is that of Gormley vs. Uthe, Supreme Court of Illinois, decided May 15, 1886, where the term "unsold" in a grant by the United States was construed and where a location upon a Military bounty land warrant, was sustained as against subsequent grant to the State of Illinois where the land located upon the Military bounty land warrant was not patented at the time of the grant to the Sate.

The second case is that of Dugget vs. Bonewitz, decided by the Supreme Court of Indiana on June 22, 1886. It is there held in construing a grant by Congress to the State of Indiana: *first*, that where land had been previously disposed of by an act of Congres, a patent issued by federal officers is invalid and *second*, that after the State had accepted a grant of land from the General Government, it cannot be withdrawn. Upon the first proposition it cited U. S. vs. Carpenter. 111 U. S., 347 and Wilcox vs. Jackson 13 Peters 516. Upon the second proposition is cited Lessieur vs. Price, 12 Howard, 59 and Murray vs. Charleston, 96 U. S., 432 and Gray vs. Coghlen, 72 Indiana, 567.

The effect of this decision is that Congress having reserved the surveyed land on the grant of February 18, 1871, could legislate as to it, as it saw fit, yet it could not legally enact the 4th. section of the act of May 27, 1880.

CHARLES & WM. B. KING,
916 F Street, Washington, D. C.
N. W. EVANS and
HON. A. C. THOMPSON.
Solicitor for the Complainants.

123-117

OCT 19 1887

Supreme Court of the United States.

October Term—1887.

John A. Coan, Plaintiff,

vs.

William J. Flagg, Defendant.

No. 21.

IN ERROR

To the Supreme Court of the State of Ohio.

Brief for Defendant.

W. A. Hutchins,
George O. Newman,
Attorneys for Defendant in Error.

Jas. W. Newman, Printer, Times Office, Portsmouth, Ohio.

Supreme Court of the United States.

John A. Coan, Plaintiff,

vs.

William J. Flagg, Defendant.

No. 21.

IN ERROR

To the Supreme Court of the State of Ohio.

Brief for Defendant.

BRIEF FOR DEFENDANT.

The case comes into this court upon error to the Supreme Court of Ohio, based upon the certificate of that court to the effect that its decision was determined by the construction given to the act of cession of the State of Virginia to the United States of certain lands "north-westward of the River Ohio," and of various acts of Congress relating to the disposition of said lands. The only questions, therefore, that can be raised in this court are simply questions of law relating to the proper construction to be given to such national legislation.

Of course, the law is to be construed with reference to the facts, but certainly this court is not to review the findings of issues of fact by the lower courts, nor as to the competency of the testimony. As to these questions the decision of the Supreme Court of the State is conclusive, and its judgment must stand, unless faulty in respect to the matter stated in its certificate, and which this court has authority to consider.

In this connection, it will be seen that the "statement of facts" set out in the brief of counsel for plaintiff in error embraces many unnecessary details, but it also contains one important statement that we controvert, and to which we call special attention.

In speaking of the warrant, entry and survey, under which the plaintiff in error claims, page 10 of brief, it is said "that the survey was *returned to the general land office within the time prescribed by law* is admitted by the pleadings." We deny that this construction can be put upon the pleadings, and it is contrary to the fact explicitly proved. The pleadings are to this effect: Flagg, in his petition, averred that he had the legal title to, was

the owner of, and was in possession of the land in dispute. (Record, page 1.) Coan, in his answer, denied such title, ownership or possession. (Record, page 4.) He then set up title and possession in himself, and in connection therewith set out the *evidence* of such title or ownership by reference in detail to the warrant, entry and survey, and various assignments and conveyances under which he claims, all which, as matter of *pleading*, was superfluous, and immaterial. The substantial averment was simply that of ownership and possession in himself; all beyond that was the mere evidence of such ownership and possession. (Record, pages 4 and 5.) The reply of Flagg to this answer covers all that was material and constituted a perfect *denial* as to all rights asserted under the alleged warrant, entry and survey. It expressly denied that the parties named "ever appropriated said premises or any part of the same by a valid and legal entry and survey under any act of Congress." And he further averred "that if said survey, or a certified copy of the same, had been returned to the general land office at Washington City, said department has refused to recognize the same as a valid survey." And he further denied that Coan, or those under whom he claimed, had acquired "any right of title, either legal or equitable, in or to said premises, or any part of the same under or by virtue of said pretended entry or survey," etc. (Record, pages 7 and 8.) This we submit, constitutes a perfect denial of the substantial averments of the answer, and it was not necessary, and would have been bad pleading to have referred to the *dates* and other details of mere matters of evidence.

Clearly this denial was sufficient to put the plaintiff in error upon *proof* as to the survey having been filed in the General Land Office *within the time required by law*. The time within which this should have been done, in order to hold the land under the survey, was *January 1st*, 1852, and the evidence shows this was not done till *April 26th*, 1852. See "Exhibit B," attached to the deposition of Daniel McCarty, being letter of W. W. Curtis,

Acting Commissioner, to L. C. Heaton, executor of David F. Heaton, under whom plaintiff in error claims. (Record, page 53.) Also letter of Willis Drummond, Commissioner, to D. F. Heaton. (Record, page 57.)

It will also be observed that even the averment as to the time when the survey was filed in the General Land Office at Washington is not explicit. It is that "on the 26th of December, A. D. 1851, the said E. P. Kendrick, surveyor for said district, duly certified said survey, (being numbered the same as said entry, 15,882) to the General Land Office at Washington, D. C., for patent, and that said survey has ever since been on file in said office." (Record, page 4.) It was "duly certified" on the 26th of December, 1851. This is the date of his certificate, but when was it *filed* by Heaton in the General Land Office at Washington? It is not averred that the certificate was filed on the date named but that it bore that date, and that by the certificate the survey was certified to the General Land Office for a patent. Kendrick, the surveyor of the land district, has nothing to do with *filing* the certificates. He simply makes them out and hands them to the parties entitled, who file them in the General Land Office in order to obtain their patents, and this, the undisputed evidence shows, was done by Heaton himself, on the 26th day of April, 1852.

This certificate is given in full (Record, page 33) and as it bears date at Chillicothe, Ohio, December 26, 1851, it could not have been filed in the Land Office at Washington on the same day, and such is not a fair construction of the averment. But whatever the effect of the averment may be held to be, it was substantially met by a denial in the reply, and hence, this date must be fixed by the evidence as disclosed in the record.

If, therefore, we are right as to the fact that the survey under which the plaintiff in error claims was *not* filed in the General Land Office at Washington on the 26th day of December, 1851,

or any time prior to January 1st, 1852, but was filed in said office April 26, 1852, as shown by the record in the office, then, we submit this is fatal to the rights of the plaintiff in error. This is the precise effect of the ruling in *Fussell vs. Gregg and others*, 113 U. S. R., 550-566.

In the case referred to the various statutes relating to these entries and surveys were fully reviewed, and it was held that where both the entry and survey had been made prior to January 1st, 1852, the *failure to make return of the survey to the General Land Office before that date* would "discharge the land from any claim founded on such location and survey and extinguish all rights acquired thereby." And further, that "the act of March 3, 1855, 10 Stat., 701, allowing persons who had made entries before January 1, 1852, two years time to return their surveys, did not apply to those who had made both entries and surveys before the latter date."

In the case at bar the entry was made December 18, 1849, was surveyed April 10, 1851, and returned to the Chillicothe Land Office, and recorded December 23, 1851. (Record, pages 4, 29, 30, 32 and 33.)

The case of *Fussell vs. Gregg and others*, had not been decided when the present case was before the Supreme Court of Ohio, and the point here made was not passed upon by that court, but it is nevertheless in the case, and, we submit, is conclusive against the reversal of the judgment, whatever may be the views of this court as to the particular grounds upon which it was based. But we confidently insist that, upon the points stated, the decision rests upon a broad and just construction of the national legislation referred to, and should be upheld by this court. The decision will be found in 38 O. St. R., 156, and in its support we submit the following considerations:

The objection to the relief sought by the defendant in error, relied upon mainly, if not entirely, is, that he did not have the legal title to the land in controversy. As the case was finally submitted, the entire scope of this objection was the alleged want of title in the Ohio Agricultural and Mechanical College, by which the lands were conveyed to Flagg, and upon which he mainly relied as the source of his title. Coming directly to the point, the contention of the plaintiff in error was that the premises in controversy are not embraced in the act of cession by Congress to the State of Ohio.

We do not understand that any question is made or can be, as to the right of the United States to grant to the State of Ohio any of the lands in the Virginia Military District remaining undisposed of, or not appropriated before that time in the manner provided by law.

From 1784, when the cession was made by Virginia to the United States, of the lands (among others) situated in what has since been known as the Virginia Military District, the time was extended by acts of Congress from time to time until August 31st, 1852, within which the Virginia troops, upon continental establishment, could obtain warrants for their bounties and satisfy the same by the location and appropriation of lands in the district referred to. Under these provisions most of the persons entitled to bounties obtained their warrants and had the same satisfied out of the lands so set apart; and in 1855, by act of Congress, the holders of entries made before January 1st, 1852, were allowed until March 3d, 1857, to make and return their surveys and warrants. See U. S. Statutes at Large, vol. 10, p. 701.

August 31st, 1852, Congress provided, by act, that warrants issued or allowed before March 1st, 1852, were allowed to be surrendered for land scrip, *and the act was required to be taken as a full and final adjustment of all bounty land claims on the Virginia*

Military District. See U. S. Statutes at Large, vol. 10, p. 143.

In Jackson vs. Clark, 1 Peters, 628, the U. S. Supreme Court recognized the validity of the limitation acts referred to.

And in Taylor's Lessee vs. Myers, 7 Wheaton, 23, the court held that an individual could *abandon* his survey by not returning it to the land office within the time specified by law, etc.

There being, however, no claim that after giving to the persons entitled to bounties a reasonable time, as was done, within which to obtain their warrants and have them satisfied with lands, and after providing also for the satisfaction by land scrip of the warrants not already satisfied, it was not within the power of Congress to cede to Ohio the residue of the lands; and this having been done, the real question is, are the premises in controversy embraced in the terms of the act of cession?

I.

We agree with counsel for the plaintiff in error, that the language used in the act may not be very well chosen, or appropriate, to designate clearly the lands ceded to the State. Both of the terms used as descriptive, in view of the true situation of the lands, is, to say the least, somewhat indefinite. The term "unsold lands," would seem to imply that some had been sold, and yet, strictly speaking, none of the lands embraced in the Virginia Military District, up to that time had been "sold." The term was used, we suppose, to exclude from the grant all of the lands the legal title to which, under the provisions of the law, had passed out of the Government, and had become vested in another, as by patent issued. The courts had held that while provision was made for the appropriation of the lands by

entry, survey and patent, and that this was the usual way for disposing of lands, still, if there had been no entry or survey, or if the entry and survey or either of them, were defective, or were void, but the Government had issued its patent granting the land, the title would pass, and the land could be treated in the broad sense as "sold" land.

Hoofnagle vs. Anderson, 7 Wheaton, 27.
Stubblefield vs. Boggs, 2 O. St., 216.
Thomas vs. White et al., 2 O St., 540.

The term "sold," as contra-distinguished from "unsold lands," covered by the cession to the State, we submit, had reference to and embraced the lands for which the Governmont had issued its patent, and thereby parted entirely with its title.

In 1871, when the act of cession was passed, most of the lands in the Military District, at least the valuable portion of the same, had been fully appropriated to satisfy the warrants allowed for bounties, and patents had been issued by the Government therefor; so that nothing remained in it in respect thereto that could be the subject of grant. And of course that class of lands would necessarily be excluded by the terms of the cession.

At the same time there was another class of lands in the District, the legal title to which still remained in the Government; but with a view to their application to the satisfaction of warrants granted for bounties, everything had been done that would entitle the holders of the warrant to their patents, and nothing was left but to issue the same therefor; still, even in the broad sense, they could not be treated as "sold lands." And while this class ought not to have been the subject of cession to the State, strictly, they were neither sold or unsold lands, and, therefore their exemption in the act of cession under the description of "unsold lands," was indefinite, and might lead to confusion. Hence, we suppose, the other term in the act, "unsurveyed

lands," was used so as to embrace, in connection with the class first named, "unsold lands," all of the lands in the District intended to be ceded to the State.

The law authorizing the holders of warrants to locate the same, ceased to operate January 1st, 1852, and since that time there has been no law which would authorize an "entry," and the most that could be done, if an entry had been made prior thereto, was to make and return their surveys. And on March 3th, 1857, even this right was terminated.

Prior to January, 1852, the District was open to locations and entries to satisfy military warrants, and by acts of Congress well-known rules were prescribed to regulate the conduct of the holders of warrants in making their entries and surveys, so as to avoid conflict or interference in respect thereto. The most notable of these was the *proviso* attached to the act of Congress passed March 2d, 1807, and continued in force as long as there was any law authorizing entries to be made. The proviso itself was suggested, doubtless, by the constant conflict that was occurring between the holders of warrants in locating the same, and in making their entries and surveys. It was to operate upon them, and obviate, so far as possible, the conflict so constantly occurring in respect to the entries and surveys then being made.

In the language of Chief Justice Marshall, in Jackson vs. Clark et al., 1 Peters, 638, "It was most truly an enactment of repose." It was intended as a prohibition upon subsequent locators from any interference, or even inquiry in respect to lands already entered and surveyed. As to the subsequent locator, the land was withheld from location. In regulating the satisfaction of warrants by the appropriation of lands set apart for that purpose, Congress had power "to withhold from location any portion of the military land;" and having by the proviso referred to withheld from location all lands previously *patented* or *surveyed*, it would follow, necessarily, that any at-

tempt to enter lands so expressly withheld from location would be null and void.

It is enough to know that such subsequent locations by the holders of warrants were a nullity, because Congress had so declared, and it had the power to so declare.

Stubblefield vs. Boggs, 2 O. St., 219.

Jackson vs. Clark et al., 1 Peters, 638-39.

It is apparent, therefore, that the proviso of 1807 was intended as a rule for the control of the holders of warrants in locating and appropriating lands in the Military District in satisfaction of the same and nothing else. It is a part and parcel of the law authorizing such locations, and prescribing how and when it may be done. And its only purpose was to withdraw certain lands from location, and prohibit the holder of a warrant from subsequently entering or surveying the same. Its entire scope was to operate upon and restrain the parties holding warrants in locating the same. It in no way, by its terms, affects the title of the Government to the land, or its right to dispose of it as it may see proper, or the right of any one acquired under the Government to the land in any other way than by entry and survey in satisfaction of a military warrant.

The conclusion, therefore, is irresistible that when, as in 1852, the right to enter and appropriate lands to satisfy military warrants ceased, or, at all events, in March, 1857, when the right to make and return surveys of land previously entered terminated, the proviso of March, 1807, so far as it could operate upon subsequent transactions, was at an end. It had served its purpose, and had become, *functus officio*. In 1852 Congress provided for the satisfaction of all the military warrants not already satisfied by the appropriation of lands, with land scrip, and thereby withdrew the military lands from appropriation for that purpose, and assumed control of it for some other purpose. And in so doing, all the rules prescribed for its appropriation,

while subject to entry, survey and patent, to satisfy military warrants, ceased to operate, and it was for Congress to prescribe the mode by which the remaining lands could be appropriated. Whatever conflict there was, or could be among those who had attempted to locate and appropriate the lands to satisfy military warrants, while there was a law authorizing it, would have to be controlled by the acts of Congress in existence when such attempt was made, including, we may concede, the proviso of March, 1807; but as to the Government, or those claiming under it by virtue of some appropriation, other than by entry and survey to satisfy a military warrant, such acts of Congress would in no way control.

II.

We do not understand that it is claimed in behalf of the plaintiff in error that the *proviso* of March, 1807, is to be applied in a controversy between the Government, and the owner of the warrant who has made an entry and survey at a time when he was authorized by law to do so, as it has been, or should be, between two conflicting entries made by the holders of warrants at different periods. Should it be, however, it is only necessary to examine the cases in which the very stringent rulings have been made by the courts, so much relied upon by counsel for Coan, to satisfy any one that both, upon principle and authority, the rule can have no such application.

The proviso itself, it must be remembered, is merely a rule prescribed to regulate and control *the holders of warrants in entering and appropriating lands to satisfy the same.* Its chief, if not only purpose, was repose and the prevention of conflicting claims,

so likely to occur, in the attempts of parties to appropriate the same piece of land. Its manifest effect was, and so intended to be, to withdraw from subsequent entry and survey, land previously surveyed and patented, and almost every respect to prevent inquiry on the part of the subsequent locator as to the validity of the previous survey or patent. The subsequent entry and survey is declared null and void, because Congress saw proper, having the power to do so, to so declare; *second*, because land already surveyed or patented, is no longer land *subject* to entry and survey, and *third*, because the subsequent entry and survey of land already surveyed or patented, is expressly prohibited.

Jackson vs. Clark et. al., 1 Peters, 638.
Price vs. Johnson, 1 O. St., 394.
Stubblefield vs. Boggs et. al., 2 O. St., 218.

Based upon the reasons of the rule given, the courts, in controversies between the parties claiming under surveys and patents covering the same land, but made at different periods, have gone to great extremes in sustaining the previous survey and in holding the subsequent survey or patent null andt void. The cases already referred to, the more recencase in Ohio of Sanders et al. vs. Niswanger et. al., 11 O. St., 302, and the various cases referred to by the court in delivering the opinions in the cases mentioned, will illustrate how far the courts have gone to sustain the prior and exclude the subsequent survey.

But it will be seen that all through the series of decisions referred to the ruling is limited to the rights of the owners of the conflicting surveys, and the effect of the proviso of 1807 upon them; and great care is observed to maintain the distinction that there is in a controversy between such parties, and one between the Government and an individual who asserts title under or against it. There may be a good reason for not permitting a party who has a conflicting claim to property to interpose

as an objection some defect of title, or fraud as between his adversary and the Government under which he claims, while as between the Government and the latter no such reason would exist. But whether there is a reason for it or not under the proviso of 1807, as interpreted by the courts, the holder of the subsequent entry and survey is hardly permitted to raise any objection to the validity of the prior survey. And when the reason given, to wit, that the land *as to him*, when his survey is made is not subject to entry, and he is expressly prohibited from making it, is considered, it is clear that, by implication at least, the right is reserved to the Government to make the objection referred to, if any such exists.

In Jackson vs. Clark et al., 1 Peters, 638, Chief Justice Marshall referring to the distinction mentioned, says: "It may be that the defendants (the owners of the senior survey) may never be able to perfect their title. The land may be yet subject to the disposition of Congress. It is enough for the present case to say, that as we understand the act of Congress, is was not liable to location when the plaintiff's entry was made."

The same doctrine is held in Price vs. Johnston, 1 O. St., 394, and the language of C. J. Marshall is quoted and approved.

See also Stubblefield et al., vs. Boggs et al., 2 O. St. 218.
Thomas vs. White et al., 2 O. St., 540.

III.

It is apparent that in 1871, when the act of cession to the State of Ohio was passed, the purpose of the United States was, by that act, to dispose of and transfer to the State all of the lands in the District not before that time actually appropriated, as provided, by law to satisfy military warrants.

As long ago as 1852 the authority for entering these lands ceased to operate, and after 1857 there was no law by which entries made prior to 1852 could be surveyed and patented. In 1852 provision was made for satisfying with land scrip the unsatisfied warrants, and in 1857 the land office was closed. From that time until 1871 there was no provision of law by which a single acre of these lands could be obtained from the Government. They had been withdrawn from location to satisfy military bounties, and there was no law authorizing their sale. They were wholly useless to the United States, and there was every reason why some definite disposition should be made of them, so that the Government should be relieved of all burden in respect to every parcel in the district remaining under its control. And this, we submit, is just what was done by the act of cession. There was no reason why any portion of the land which really remained under the control, or was undisposed of by the Government, should be excepted from the grant. And none was excepted. The grant is sweeping in its terms, and embraced every acre not already appropriated as against the Government under the provisons of the law authorizing such appropriation. Whatever title or estate remained in the United

States was granted to the State. The only limitation therefo re there is upon the title so acquired by the State, is the limitation that was upon the title of the United States at the time of the act of cession.

IV.

As against the Government, was the land in controversy *appropriated* by the survey made in the name of the Gordon heirs?

We have seen that the proviso of 1807 was simply a rule to regulate the conduct of the holders of warrants in making their entries and surveys under the same, and had no application to the Government in determining its rights in respect to the land sought to be appropriated. That its effect was merely to *withdraw* from subsequent entry and survey by the holder of a warrant, lands alreary surveyed or patented, and to *prohibit* such holder from making a subsequent entry and survey thereon. But as to the Government, the question remained open as to whether or not the *previous* survey appropriated the land. We have seen, also, that the manifest purpose of the act of cession was to transfer to the State of Ohio all the land remaining in the District not already appropriated, either by patent granted, or by a survey, *valid and legal*, not only as to subsequent locators under military warrants, but as to the Government itself. And the important inquiry in the case is, was the land in question *appropriated* by a survey subsisting at the time of the act of cession, *valid and legal as against the Government?*

There is no controversy in this case between conflicting sur-

veys, based upon military warrants, and therefore nothing to be affected by the proviso of 1807.

It is a question simple and pure between the United States and the holders of the survey under whom defendant below claims. If it was a legal, valid, subsisting survey, such as would appropriate the land as against the Government at the time the act of cession was passed, no title would pass to the State, and none would pass to the college, or from it to the plaintiff below. On the contrary, if the survey was not at that time a legal, valid or subsisting one, such as would *against the Government* appropriate the land, whatever its effect would have been under the operation of the proviso of 1807 in a controversy between locators, the land was subject to grant by the United States, and the title would pass under the act of cession.

It will be remembered that long prior to the act of cession, to wit, as early as March 3d, 1857, all laws providing for the completion and return of surveys in the district, ceased to operate, and there was no provision of law in force that would authorize any act on the part of the owner of a survey, or any Government official, in the way of correcting a survey, or in curing defects, or in relinquishing a portion of the land covered thereby, so as to render the same legal and valid to the extent of appropriating the land, when otherwise it would not be appropriated.

On page 11 of the brief of the plaintiff in error, reference is made to certain acts of the Virginia Legislature on the subject of the satisfaction of bounty warrants by the appropriation of certain lands set apart for that purpose, in which it is provided that no outside party should be permitted to claim any surplus contained in a survey, except during the lifetime of the patentee, or original grantee, &c.; and providing also, that a surplus of five percent. should not be regarded. Whatever effect the acts referred to had upon the lands entered under them, it is

enough to know that they never had any effect upon the appropriation of lands in the Virginia Military District to satisfy military warrants. Such appropriation was provided for and regulated exclusively by Congressional legislation. On page 12 of the same brief there is a reference also to an act of Congress passed May 20th, 1826, by which provision is made for the case in which a greater quantity of land than the rank or term of service of the officer or soldier to whom, &c., such warrant has been granted, would have entitled him to under the laws of Virginia; and it is argued that said act will control the Government in respect to any surplus that there may be in the Gordon survey.

From a careful reading of this act, however, it will be perceived that the case provided for is the one in which, by a mistake, the warrant has been granted for more land than the rank or term of service of the officer or soldier entitled him to, and not the case of an attempted appropriation of a greater quantity of land than was called for by the warrant itself. And, besides, the clause referred to is by its very terms, limited to patents issued by virtue of *section* 1 of the same act, and *that section* ceased to operate entirely June, 1829, so far as it authorized officers and soldiers to obtain warrants; and in June, 1832, for the completion of the location of the warrants; and in June, 1833, for the return of the surveys and warrants. See vol. 4, U. S. Statutes at Large, p. 189. And no subsequent act of Congress made the section quoted by the plaintiff in error in his brief, applicable to any other than patents issued by virtue of Section 1 of the said act, approved May 20th, 1826.

And so also in regard to the act of Congress approved May 27th, 1880, (long since the determination of this action in the courts below.) In none of its provisions does that act apply to the lands in controversy in this case. On the contrary, by the very terms of Sec. 4, the tract in question is exempted from its provisions.

We repeat, therefore, that since 1857 there has been no provision of law that could in any way enable the Gordon heirs to perfect their survey, cure any defect or irregularity that existed in respect to it. or change it in any way so as to make it a valid, legal, subsisting survey *as against the Government*, such as would *appropriate* the whole or any portion of the land covered by it, when it otherwise would not, nor could, have had that effect.

The survey must be adjudged as it stood after March 3d, 1857, when the law for the completion and return of surveys in the district expired by its own terms. If sufficient then, or on the 18th of February, 1871, when the act of cession was approved, to *appropriate* the land in controversy as to and against the United States, it never was or could be, and as a result, the title would pass by the grant to the State of Ohio.

The term "surveyed land," in the Virginia Military District, may be said to have had two significations depending upon the parties to be affected. A "survey," as it was to be understood, by one who would seek by virtue of a military warrant to enter and survey the land covered by it, was "a *bona fide* attempt to locate lands under a warrant by entry and survey." Because, "the effect was to *withdraw* such lands from subsequent location upon another warrant, whether such entry and survey was valid or void."

Price vs. Johnston, 1 O. St., 397.

But as to the Government, by the term "survey" was meant not simply a *bona fide* attempt to locate lands under a warrant by entry and survey, but a *legal, valid survey*, such as would appropriate the land as to and against the United States. If void, no title or interest, either legal or equitable, would pass out of the Government, but the whole would remain in it, as it did before the attempt was made. "It has the effect, and this only, to exclude every person except the legal holder of the warrant

from encroaching upon the land thus attempted to be appropriated by subsequent locations."

See also Jackson vs. Clark, 1 Pet. R., 628.

The counterpart of the term "unsurveyed lands" used in the act of cessions, to wit, "surveyed lands," must be understood either in the sense given to it in respect to the holder of a warrant who would seek, by a subsequent entry and survey, to appropriate the land covered by a prior survey, or in the sense that attaches to it where the rights of the Government are to be affected by the act done.

The contention of the plaintiff in error is, that the term as it is used in the grant to the State, must be understood as contradistinguished from its counterpart, "surveyed lands," as that term is understood in respect to the rights of a subsequent locator of a warrant upon the same land. And it is absolutely essential to him that he should maintain such a claim. If he can succeed in so doing, he may, or may not, obtain the reversal of the judgement; but if he fail, he cannot possibly succeed in the reversal.

The reference by his counsel in his brief to the cases in which the courts have given to the term mentioned the signification claimed for it, is quite full, and while it may be difficult to harmonize them all the rule may be considered as well enough established, that the courts have gone almost to the verge of absurdity in applying the proviso of 1807 to sustain the senior survey. And while they have not done so in every case, in view of the reasons given by the courts, we need not care to complain of their rulings.

See Sanders et al., vs. Niswanger et al., 11 O. St., 298, and the review of all the cases cited in the opinion of Justice Gholson.

But in every one of the cases referred to, in which

the meaning claimed by the plaintiff in error for the term "surveyed lands," was between conflicting entries and surveys, and the rights of the respective locators of warrants were involved. In no one case that we are aware of, certainly in no case cited by counsel for Coan, or found by us, where the controversy has been between the holder of the survey and the Government, or where the rights of the Government in respect to the land were involved, or the question was as to the appropriation of the land as against the Government, has any court given to the term the signification which is claimed for it by the plaintiff in error. In no case has it ever been held that, by virtue of the proviso of 1807, the Government is *prohibited* from interfering with land sought to be appropriated by an entry and survey, or from enquiring into regularity, validity or legality of the survey. And least of all, is land covered by a survey without reference to its regularity, its validity or legality, *withheld* from the control or subsequent appropriation by the Government. On the contrary, such an inquiry, control and right in behalf of the United States, is fairly deducible from the decisions, and recognized by the courts in the very cases relied upon by the counsel for Coan.

The enquiry still remains, did the survey of the Gordon heirs appropriate the land in controversy as against the Government, or so affect either the legal or equitable title to it, that it is no longer the subject of grant.

As to the Government, the entry and survey are but the *preliminary* steps towards the appropriation of the land; but whether the proceedings are to be consummated by which the appropriation is to become complete, is certainly a matter beyond the mere entry and survey. Until the patent has issued, the land, to some extent at least, if not fully, is under the control of the Government. Indeed, it has been said that "if the patent has been issued irregularly, the Government may provide means for repealing it."

Miller vs. Kerr, 7 Wheat, 1.
Thomas vs. White et al., 2 O. St., 549.

And if, therefore, until the patent has issued, the land is still under the control of the Government, there must abide in it the power to examine into the regularity and validity of the preliminary steps, and especially in respect to the entry and survey. The right to examine and inquire must imply the right to determine, and to accept or reject the entry and survey as valid and regular or otherwise. And upon the result will depend the issuing of, or refusal to issue the patent. This right to accept or reject as regular and valid the entry and survey, may not be an unlimited one or a right to be exercised arbitrarily. And while as against the Government the courts may be powerless to compel the issuing of a patent, we may concede that cases may arise in which the determination of the Government may be the subject of review by the courts. It is not necessary, certainly, in this case that we should claim that the courts possess no such power.

We may grant, for the sake of the argument, that to constitute in its broadest sense an appropriation of the land in question, so as to leave nothing in the Government to pass by the act of cession to the State, it was not necessary that the patent should have issued; but, certainly, it was necessary that the entry and survey should have been a valid, legal, subsisting one, as to and against the Government itself, and so complete as to create in favor of the Gordon heirs a perfect, equitable title, one upon which, if it were not for the want of power in respect to the party to be affected, the courts would have predicated a decree for the legal title. But we may say, that in so liberal concession, we do not admit that the proviso of 1807 is to figure in the slightest. On the contrary, the rights of the parties are to be determined precisely as if there had never been any such proviso.

Was there then a valid, legal, subsisting entry and survey as to and against the Government, the effect of which was to give to the Gordon heirs a perfect, equitable title to the land embraced in their survey?

First. The Government itself has answered this in the negative. It was the right of the Government to examine into the matter and determine whether are not the entry and survey were made in accordance with the law; and it has done so, and we have the result in the record which it has kept.

It is true that various objections are made by the counsel for Coan to this action of the Government. (1.) It is objected that the mode of proof as to the determination of the Government is incompetent. The deposition of Daniel McCarty, who had been a clerk in the General Land Office since 1852, and ever since 1857, has had exclusive charge under the various Commissioners of all matters pertaining to the Virginia Military District of Ohio, was taken, and he testifies that the only record kept of the action of the General Land Office touching the matters involved, is the correspondence between the clerk having charge of the business, approved by the signature of the Commissioner, and recorded in full on the letter books of the office, and the parties to be affected by the action. These letters, so recorded and preserved, contain the evidence of the action taken and the determination arrived at; and copies of the same, taken from the record and sworn to by the clerk, is the evidence objected to. We submit that it is in every respect competent in that way to establish the action of the proper department of the Government on the subject. (2.) Objection is made also as to the time when the action of the Government took place. The matter considered was something that had occurred prior to 1857. And the inquiry was not as to matters transpiring after the act of cession, but long prior thereto; and the effect was simply to ascertain the status of the claimants in respect to the land in question at and prior to 1871. If their entry and sur-

vey had been adjudged valid and legal, so as to give them a complete, equitable title, the patent would have issued, and the title would have then have related back to the time of the return of the survey; and in that event, there was nothing in the Government, except the naked legal title, that could have passed to the State of Ohio.

The objection is based upon the idea that the determination of the Commissioner of the General Land office had something to do with the *creation* of the title; but nothing of the kind is claimed as the result of that action. It neither weakened nor strengthened the title of the State or College. Our claim is, that if by the entry and survey the land in suit was *appropriated* even by a complete equitable title as against the Government, when in 1871 the act of cession was approved, there was nothing, except the naked legal title in the Government, and nothing would pass by the grant. And all that was done by the Commissioner was simply to pass upon and determine, when the application for a patent was made, whether or not the entry and survey created such an equity as would entitle the holder to a patent for the land. And this was what was done, and no more. No one has claimed that the decision of the Commissioner was equivalent to a patent to the State of Ohio. Its title came by the act of cession, and the effect of the decision of the Commissioner was simply the rejection, as illegal and invalid, of the survey of the Gordon heirs.

(3.) It is objected also that the Commissioner of the General Land Office *alone* could not decide upon the legality of the entry and survey, and that sections 2,447, 2,455, 2,450 and 2,451, U. S. R. S., required that he should act in conjunction with the Secretary of the Interior and the Attorney General. We submit, that none of these sections sustain the objection made. They have reference to another class of cases, especially sections 2,450 and 2,451, which are the only ones that bear upon the subject.

The letters of the Commissioner will show that an appeal could have been taken to the Secretary of the Interior, and 60 days were given to Heaton within which to take his appeal; but none was taken. We maintain, therefore, that the usual and ordinary course was taken to obtain the determination of the Government, acting through the proper department, in respect to the legality or validity of the survey, and that the decision was adverse.

Second. But, even if the Commissioner had no power to act, or if his action was informal and irregular, or if it is true that his decision is not final, the same conclusion must be reached by any court having jurisdiction to determine the question. The legal title to the property involved remained in the Government, and the most that can be claimed is, that it held it subject to the equities that existed in favor of the Gordon heirs. These were equities, if any existed, *against the Government*, and in favor of the parties who were attempting by an entry and survey to appropriate a portion of the lands belonging to it.

The warrant under which it was sought to make the appropriation called for 500 acres of land, and no more. To that extent it was authority for the appropriation of the lands in the Virginia Military District, and beyond that it conferred upon the holder no authority whatever. Without such a warrant no entry or survey could be made at all; and with such a warrant, the authority to make the entry and survey was limited to the number of acres called for by the warrant. An entry and survey of more land than was called for by the warrant was just as unauthorized as to the excess as an entry and survey without any warrant whatever. And this was the argument that was used in Clarke vs. Jackson et al., 1 Peters R., 635, the weight of which, as Chief Justice Marshall said in deciding the case, "the court felt," and had "bestowed upon it the most deliberate consideration." But the controversy in that case was between parties claiming under entries and surveys made at different

periods upon the same land, and in view of the proviso of 1807, notwithstanding the senior survey was based upon a warrant *already satisfied*, the subsequent survey was held void; because, as was said, *as to him*; at the time he made his survey the land was *withheld* from entry, and he was *prohibited* from making his survey. While so holding, however, the court recognized the difference between that class of cases and those where the question was between the holder of a survey based upon a warrant already satisfied and the Government. See the language of the court, on pages 638-9.

The Government refused to carry the survey into grant, and to issue to the Gordon heirs a patent for the land covered by it, because, with a warrant calling for 500 acres, two entries and surveys were made, one for 400 acres, so-called, covering the land in controversy, but embracing, in fact, as ascertained by actual survey, 1,682 acres of land; the other for 100 acres, so-called, but embracing, by actual survey, 517 46-100 acres. In the 400 acre survey, so-called, for the attempted appropriation of the 1,282 acres in excess of said 400 acres, there was no authority or warrant whatever. The owners of the warrant were in no way entitled to any part of said excess, and there was certainly no reason why the Government should be deprived of it. As to the 1,282 acres no equity existed, or could exist, in favor of the holders of the survey, and none could grow up against the Government. Upon what, then, could Gordon's heirs predicate any claim to it? But the claim of Coan seems to be, that, inasmuch as the warrant was authority for appropriating 400 acres covered by the survey, the surplus must go along with it; or, if that is not his claim, it is, that with an authority to appropriate 400 acres of land, you may appropriate 1,682 acres, and still, even as to the Government, that is to be immediately affected by it, the survey is in no way vitiated. The mere statement of either proposition shows its absurdity. It must be borne in mind that the most that can be claimed is,

that there had been an *equitable* appropriation of the land in question as to the Government, and therefore, at the time of the grant to the State, the Government had nothing except the naked legal title, that it could grant. An *equitable* appropriation must arise out of or be based upon equitable principles; and what equity is there in compelling the Government to give up 1,682 acres to a party who has a claim upon it for 400 acres? Or in awarding to a claimant 1,682 acres, because he has a warrant that entitles him to 400?

The brief for Coan contains a reference to quite a number of cases, in which it is said a surplus in a survey does not vitiate it. And that there can be no entry or survey of the surplus so as to deprive the holder of the survey containing the surplus in it. We have no doubt that decisions to that effect can be found. But as to whom does such doctrine apply? Not the Government, certainly, that is to be affected by it, where no patent has issued; but to third parties, who were mere volunteers in behalf of the Government, or are seeking to interfere, and appropriate land that they are *prohibited* from interfering with, as they were by the proviso so often referred to. But besides, the cases in which the doctrine has been recognized, are those in which but a small quantity of surplus land was embraced, such as might naturally, by mistake, or error in making the survey, be included. But no case has been, or can be found, we apprehend, where the surplus is more than *three times* as much as the quantity authorized to be appropriated and the rights of the Government are directly involved, to sustain so startling a proposition.

But it is argued that the survey, if vitiated at all, is only vitiated to the extent of the surplus. 400 of the 1,682 acres covered by the survey, it is claimed, is in equity appropriated to satisfy so much of the warrant. But the trouble is, which 400 of 1,682 acres is so appropriated? Possibly, while there was a law in force which authorized entries and surveys to be

periods upon the same land, and in view of the proviso of 1807, notwithstanding the senior survey was based upon a warrant *already satisfied*, the subsequent survey was held void; because, as was said, *as to him*, at the time he made his survey the land was *withheld* from entry, and he was *prohibited* from making his survey. While so holding, however, the court recognized the difference between that class of cases and those where the question was between the holder of a survey based upon a warrant already satisfied and the Government. See the language of the court, on pages 638-9.

The Government refused to carry the survey into grant, and to issue to the Gordon heirs a patent for the land covered by it, because, with a warrant calling for 500 acres, two entries and surveys were made, one for 400 acres, so-called, covering the land in controversy, but embracing, in fact, as ascertained by actual survey, 1,682 acres of land; the other for 100 acres, so-called, but embracing, by actual survey, 517 46-100 acres. In the 400 acre survey, so-called, for the attempted appropriation of the 1,282 acres in excess of said 400 acres, there was no authority or warrant whatever. The owners of the warrant were in no way entitled to any part of said excess, and there was certainly no reason why the Government should be deprived of it. As to the 1,282 acres no equity existed, or could exist, in favor of the holders of the survey, and none could grow up against the Government. Upon what, then, could Gordon's heirs predicate any claim to it? But the claim of Coan seems to be, that, inasmuch as the warrant was authority for appropriating 400 acres covered by the survey, the surplus must go along with it; or, if that is not his claim, it is, that with an authority to appropriate 400 acres of land, you may appropriate 1,682 acres, and still, even as to the Government, that is to be immediately affected by it, the survey is in no way vitiated. The mere statement of either proposition shows its absurdity. It must be borne in mind that the most that can be claimed is,

that there had been an *equitable* appropriation of the land in question as to the Government, and therefore, at the time of the grant to the State, the Government had nothing except the naked legal title, that it could grant. An *equitable* appropriation must arise out of or be based upon equitable principles; and what equity is there in compelling the Government to give up 1,682 acres to a party who has a claim upon it for 400 acres? Or in awarding to a claimant 1,682 acres, because he has a warrant that entitles him to 400?

The brief for Coan contains a reference to quite a number of cases, in which it is said a surplus in a survey does not vitiate it. And that there can be no entry or survey of the surplus so as to deprive the holder of the survey containing the surplus in it. We have no doubt that decisions to that effect can be found. But as to whom does such doctrine apply? Not the Government, certainly, that is to be affected by it, where no patent has issued; but to third parties, who were mere volunteers in behalf of the Government, or are seeking to interfere, and appropriate land that they are *prohibited* from interfering with, as they were by the proviso so often referred to. But besides, the cases in which the doctrine has been recognized, are those in which but a small quantity of surplus land was embraced, such as might naturally, by mistake, or error in making the survey, be included. But no case has been, or can be found, we apprehend, where the surplus is more than *three times* as much as the quantity authorized to be appropriated and the rights of the Government are directly involved, to sustain so startling a proposition.

But it is argued that the survey, if vitiated at all, is only vitiated to the extent of the surplus. 400 of the 1,682 acres covered by the survey, it is claimed, is in equity appropriated to satisfy so much of the warrant. But the trouble is, which 400 of 1,682 acres is so appropriated? Possibly, while there was a law in force which authorized entries and surveys to be

made, and lands to be appropriated in that way, to satisfy military warrants, if the Government had refused on account of the surplus to carry the survey into grant, the warrant might have been withdrawn, and a survey, embracing the proper quantity, made. But there is no law in force, and has not been, at least so far as these lands are concerned, since 1857, to warrant any such action. And the result is, that since the law ceased to operate, and expired by its own limitation, the only relief that a party can have, if he has failed within the time limited to have his warrant satisfied by valid survey with the land in the District, is to have it satisfied with land scrip. The provision referred to is ample and complete to cover any such case as the one involved. And if it were otherwise, the party who has embraced so much surplus land in his entry and survey as to justify the Government in refusing to carry it into grant, is the one, if anybody, that should suffer.

But we plant the right of the Government to reject the survey entirely upon a much higher principle, and could go far to justify it even in a case where the Government alone was not concerned, but where the rights of a subsequent locator were involved, although it is by no means required that we should maintain the latter branch of the claim.

Judge Ranney, in delivering the opinion of the court in Price vs. Johnston, 1 O. St., 397, in referring to the conflicting decisions as to the import of the proviso of 1807, and in endeavoring to reconcile them, says it can be done by "holding that every *bona fide* attempt to locate lands under a warrant by entry and survey, has the effect to *withdraw* such lands from subsequent location upon another warrant, whether such entry and survey is valid or void." And the *bona fides* of the senior entry and survey should have much to do certainly in withholding the land from subsequent survey. But, if as between conflicting surveys, the *bona fides* of the entry and survey should be an important element, how much more should its effect be in a con-

troversy between the locator and the Government, in which it is sought, upon *equitable considerations*, to appropriate a portion of its lands?

It might be that the owner of a warrant, acting in entire *good faith*, could embrace a small quantity of surplus land in his survey, and no doubt it has been frequently done; but when a warrant calling for 500 acres is used as the foundation of two surveys—one for 400 acres, and the other for 100, and by actual measurement the former is made to cover 1,682, and the latter 517 46–100 acres, the presumption of *good faith* or *innocent mistake* is overcome, and the very reverse must be the presumption. In fact, the attempted appropriation of the amount of land embraced in the two surveys, to satisfy a military warrant calling for five hundred acres, and no more, upon its very face, is a most arrant fraud upon the Government, a fraud so palpable and glaring, that out of such a transaction, in the language of Judge Reed, "no equity can ever blossom." The Government having ignored the survey, and refused *absolutely* to carry it into grant, and there being no equity in the claim; and the survey itself being so strongly tainted with fraud, the conclusion is irresistible that, at the time of the act of cession to Ohio, the land in question was in no way appropriated, either legally or equitably, to satisfy the warrant of the Gordon heirs; and it was therefore the subject of grant by the Government, and would pass by the cession to the State.

But as we have already said, these are questions that cannot be raised before this court, and we should not have noticed them but for the fact that they are referred to in the brief of opposing counsel.

W. A. Hutchins,
George O. Newman,
Attorneys for Defendant in Error.

3-131
123-131
9- Original

THE PETITION

— OF —

AUGUST SPIES AND OTHERS,

— FOR —

WRIT OF ERROR.

M. SALOMON,
W. P. BLACK,
ROGER A. PRYOR,
J. RANDOLPH TUCKER,
Attorneys for Petitioners.

AUGUST SPIES *et al.*

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

Petition for Writ of Error, &c., from the Supreme Court of the United States to the Supreme Court of the State of Illinois.

To the Honorable JOHN M. HARLAN, *Justice of the Supreme Court of the United States:*

And now come August Spies, Michael Schwab, Oscar Neebe, Samuel Fielden, Albert R. Parsons, George Engel, Adolph Fischer and Louis Lingg, jointly and severally, by Moses Salomon, W. P. Black, Roger A. Prior, and J. Randolph Tucker, their attorneys, and complain that in the record and proceedings, and also in the rendition of the final judgment in a suit wherein said Spies, Schwab, Neebe, Fielden, Parsons, Engel, Fischer and Lingg were plaintiffs in error, and the People of the State of Illinois were defendants in error, in the Supreme Court of the State of Illinois, for the Northern Grand Division, being the highest Court of said State in which a decision could be had in said suit, and in which a final judgment was rendered against them on the 14th day of September, A. D. 1887, in said suit, certain Federal questions were presented, claimed and determined in said Court and cause, and the proceedings therein, and the decision thereof, was adverse to and against the right, privilege, immunity and claim of your petitioners; in the determination of which there was manifest error.

And there was also, as shown by the record, drawn in question the validity of certain statutes of the State of Illinois, which were claimed by your petitioners to be

repugnant to the Constitution of the United States, and consequently invalid; and the decision of said Supreme Court of the State of Illinois was in favor of the validity of said statutes.

Said Federal questions, &c., were as follows, to wit:

I.

Section 709 of the Revised Statutes of the United States (page 133, second edition, 1878) provides as follows, to wit:

"A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority, may be re-examined and reversed, or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Court of the United States."

The record in this case shows that there was drawn in question in this case the validity of a statute of the State of Illinois, on the ground of its being repugnant to the Constitution of the United States, and the decision of the said Supreme Court of the State of Illinois was in favor of the validity of said statute. Also that the State of Illinois

made and enforced against your petitioners a law abridging the privileges and immunities of citizens of the United States; and also the record shows that a right, privilege and immunity was claimed under the Constitution of the United States by your petitioners, and the decision was against said right, &c., as follows, to wit:

Section 1 of Article 14 of the amendments of the Constitution of the United States provides as follows, to wit:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Article 3, Section 2, Clause 3 of the Federal Constitution provides as follows, to wit:

"The trial of all crimes, except in cases of impeachment, shall be by jury."

Article 5 of the amendments of the Constitution of the United States provides as follows, to wit:

"No person shall * * * be deprived of life, liberty or property without due process of law."

Article 6 of the amendments of the Constitution provides as follows, to wit:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed," &c.

To the same effect the Constitution of the State of Illinois, adopted A. D. 1870, by Section 2 of Article 2, provides as follows, to wit: "No person shall be deprived of life, liberty or property, without due process of law." While in the same Constitution by Section 9 of Article 2, "Bill of Rights," it is provided as follows:

"In all criminal prosecutions, the accused shall have the

right * * * to a speedy, public trial by an impartial jury of the county or district in which the offence is alleged to have been committed."

The State of Illinois, by an Act of the Legislature, approved March 12th, 1874, and in force July 1st, 1874, provided as follows, to wit: (Hurd's Rev. Statutes of Illinois, 1885, Page, 752, Ch. 78, Section 14.)

"It shall be sufficient cause of challenge of a petit juror that he lacks any one of the qualifications mentioned in Section 2 of this Act; or if he is not one of the regular panel, that he has served as a juror on the trial of a cause in any Court of Record in the county within one year previous to the time of his being offered as a juror; or, that he is a party to a suit pending for trial in that Court at that term. It shall be the duty of the Court to discharge from the panel all jurors who do not possess the qualifications provided in this Act, as soon as the fact is discovered: Provided, if a person has served on a jury in a Court of Record within one year, he shall be exempt from again serving during such year, unless he waives such exemption: *Provided further*, that it shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of the crime with which the prisoner is charged, if such juror shall state on oath that he believes he can render an impartial verdict according to the law and the evidence: and *Provided further*, that in the trial of any criminal cause, the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall upon oath state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the Court shall be satisfied of the truth of such statement."

In this case the Criminal Court of Cook County held that said statute controlled as to the qualifications of jurors, and that under this statute a man was a competent and

qualified juror, and not subject to challenge for cause on account of prejudice or partiality, notwithstanding any opinion formed and expressed by him touching the guilt or innocence of the accused, which opinion was based on what he had heard and read touching the matter inquired of, and notwithstanding the proposed juror stated that he still entertained an opinion that the defendants, or some of them, were guilty as charged, or upon the question of their guilt, and that he still belived to be true the accounts heard and read by him; and that his opinion was so fixed that it would require evidence, and even strong evidence, to change that opinion; provided only the juror would state that he did not know that he had expressed any opinion as to the truth of the reports read or heard by him prior to his being called as a juror, and that he believed he could render a fair and impartial verdict in the cause.

[See examinations, and rulings thereon, of panelmen Frank Jacobson (Vol. A, 256); John Johnson (Vol. B, 140); Clarence H. Hill (Vol. B, 168); W. U. Upham (Vol. A, p. 52); E. F. Shedd (Vol. A, 418); A. F. Bradley (Vol. A, 156); William Neil (Vol. C, 44); Jas. S. Oakley (Vol. C, 79); *H. F. Chandler* (Vol. C, 134); A. L. Ketchum (Vol. C, 162); D. F. Swan (Vol. C, 176); Edward Knauer (Vol. C, 89); F. I. Wilson (Vol. C, 265); John Connolly (Vol. C, 318); Geo. N. Porter (Vol. D, 182); H. N. Smith (Vol. D, 302); Isaac W. Pinkham (Vol. D, 330); Leonard Gould (Vol. E, 474); James H. Walker (Vol. F, 35); W. D. Allen (Vol. C, 110); H. L. Anderson (Vol. C, 484); T. E. Keefe (Vol. D, 36); M. D. Flavin (Vol. D, 402); Rush Patterson (Vol. F, 56); Leroy Hannah (Vol. G, 164).]

The petitioners objected that this statute was repugnant alike to the provisions of the Federal Constitution and of

the Constitution of the State of Illinois (Record, Vol. G, p. 173), and deprived the accused of the right, privilege and immunity of trial by an impartial jury; abridged the privileges and immunities of the petitioners as citizens of the United States; and objected and claimed that said statute deprived petitioners of life, liberty, &c., without due process of law. The position of attorneys for petitioners upon this point and the ruling thereon, as shown by the record above cited, are as follows, to wit:

"*Mr. Salomon:* Now, if your Honor please, we desire to call the Court's attention briefly (to the statute?) We have gone over it quite a number of times, but it seems to me that there is a constitutional provision governing the qualification of a juror. That provision is found both in the United States Constitution and the Constitution of the State, that a defendant shall be entitled to a trial by an impartial jury. Now, of course an impartial jury is composed of impartial jurors. Now, what is an impartial juror? It means a man who is not prejudiced against these defendants at the beginning of the case, who sits here fairly, uninfluenced, unbiased by any feeling or by any inclinations against them at the beginning of this case. Now, this has been stated strongly by the Supreme Court of this State in the 56th Illinois—in the case of the Railroad Company *vs.* Adler, or Adler against the Railroad Company, and also in the Virginia case which I have here, and would call your Honor's attention to, if the Court cares to take up the time to hear the opinion. Now, this statute plainly to our way of thinking takes away, or attempts to take away, the partiality of the juror: in other words, it attempts to make a partial juror impartial and competent, if he himself says that he believes he can fairly and impartially try the case, notwithstanding he already says that he has a fixed and decided opinion and a prejudice against the defendants.

"*The Court:* Well, as to the constitutionality of the statute, the Supreme Court have expressed thir approval of it, so that that is out of the question. What the Supreme

Court have said is constitutional, a Court of inferior degree has no right to say afterwards is not constitutional.

"*Mr. Salomon:* The Supreme Court have said in different cases time and again——

"*The Court:* Save the point upon it.

"*Mr. Salomon:* Well, we desire to have the record show that we base the objection on the statute as being in conflict with the constitutional provisions.

"To which ruling of the Court counsel for the defense then and there excepted."

Said rulings and decisions of said Criminal Court were duly assigned for error in said cause in the said Supreme Court of Illinois; but the said Illinois Supreme Court held the above construction, exposition and application to the case of said statute to be correct; and that said statute and its said exposition and application was valid, and was not repugnant to the said constitutional provisions; and said Illinois Supreme Court thereby denied to the accused the claim, right, privilege and immunity of trial by an "impartial jury," and also by their decision deprived petitioners of life, liberty and property without "due process of law." And abridged the privileges and immunities of petitioners as citizens of the United States, contrary to and in violation of the Constitution of the United States.

II.

The petioners asserted and claimed under the Constitution of the United States the right, privilege and immunity of trial by an impartial jury, and the decision of the said Supreme Court of the State of Illinois was against the right, privilege and immunity so asserted and claimed.

III.

The State of Illinois made, and the said Supreme Court of said State enforced against petitioners, a law, to wit: Said act approved March 12th, A. D. 1874 (referred to *Ante*, I.), whereby the privileges, rights and immunities of petitioners, as citizens of the United States were abridged, contrary to the Fourteenth Amendment of the Federal Constitution; and also contrary to the provisions of Article 3, § 2, clause 3, of the original Constitution of the United States; and Articles 5 and 6 of the Amendments of said Constitution.

IV.

The petitioners claimed in said cause the right, privilege and immunity, of the "equal protection of the law" guaranteed to them under Article 14 of the Amendments of the Federal Constitution; and such right, privilege and immunity were denied to them by the decision of said Supreme Court of said State, which decision was adverse to their claim, to wit:

(*a.*) By Sections 6 and 9 of Article 8 of the first Constitution of the State of Illinois, adopted A. D. 1818, it was provided as follows, to wit:

"SECTION 6. That the right of the trial by jury shall remain inviolate.

"SECTION 9. That in all criminal prosecutions the accused hath the right to * * a speedy public trial by an impartial jury of the vicinage."

By Section 9, Article 13 of the second Constitution of the State of Illinois, adopted A. D. 1848, it was, amongst other things, provided as follows, to wit:

"That in all criminal prosecutions the accused hath the right to * * * a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed."

By a uniform current of decisions, the Supreme Court of Illinois held, under said Constitutions of 1818 and 1848, that under the said provisions above quoted, one on trial charged with a criminal offense was entitled to an impartial jury—a panel of impartial jurors; and that if a proposed juror admitted upon his *voir dire* that he had a fixed or firm opinion touching the question of the prisoner's guilt, no matter upon what such opinion was based, an opinion to remove which evidence would be required, such person was not impartial within the constitutional provisions quoted; and where such persons were held competent to sit as jurors by the trial court, such holding was by the said Supreme Court held to be error, and for such error the judgments were reversed in favor of such accused persons.

See Smith *vs.* Eames, 3 Scammon, 76.
Gardner *vs.* People, 3 Scammon, 83.
Vennum *vs.* Harwood, 1 Gilman, 659.
Baxter *vs.* The People, 3 Gilman, 368.
Neely *vs.* The People, 13 Illinois, 685.
Gray *vs.* The People, 26 Ills., 344.
Collins *vs.* The People, 48 Ills., 146.
Chicago & Alton R. W. Co, *vs.* Adler; 56 Ills., 344.

By Sections 5 and 9 of Article 2 of the third Constitution of the State of Illinois, adopted A.D. 1870, it was, among other things, provided as follows:

"SECTION 5. The right of trial by jury as heretofore enjoyed shall remain inviolate; but the trial of civil cases before justices of the peace by a jury of less than twelve men may be authorized by law.

"SECTION 9. In all criminal prosecutions the accused shall have the right to * * * a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Under these provisions of said last-mentioned Constitution the same ruling was enforced touching the disqualification of a proposed juror by reason of the formation of a fixed opinion as under the prior Constitutions.

Winnesheik Ins. Co. *vs.* Schueler, 60 Ill., 465.
Plummer *vs.* The People, 74 Illinois, 361.

But in this case the protection, privilege, right and immunity of this uniform construction of the Constitutions of the State of Illinois were denied to the defendants, whereby they were deprived of "the equal protection of the laws," it being held in this case as against the petitioners by said Supreme Court of the State of Illinois, but without overruling, modifying or calling in question any of such prior opinions and decisions of said Court, that the prior opinion of the proposed juror concerning the guilt of the accused, though firm and deeply seated, based on reports fully believed to be true, and though said opinion was of such a nature as would require evidence, and even strong evidence, for its removal, did not render such person disqualified to sit as a juror for the trial of this case and these petitioners.

See examinations of talesmen heretofore cited; and also P. J. Raleigh (Vol. A, 235); Lancaster (Vol. A, 84); W. H. Whitehead (Vol. C, 64); *T. A. Harney* (Vol. D, 13); *Geo. F. Baker* (Vol. D, 67); E. H. Martin, (Vol. D, 295); H. W. Cole (Vol. E, 431); S. A. Maxwell (Vol. E, 499); W. T. Chandler (Vol. F, 43); Arthur Hugunin (Vol. G, 126); F. L. Dillon (Vol. H, 89); F. L. Koontz (Vol. H, 109); *A. Nelson* (Vol. H, 114); W. F. Conklin (Vol. H, 182), and Chas. Roberts (Vol. H, 219).

(*b*) The Supreme Court of Illinois has uniformly accorded to other persons accused of crime the protection in the selection of a jury of excluding from the jury, as disqualified by reason of partiality, favor or bias, persons who confessed a prejudice against the class of persons to which the defendants confessedly belonged.

See Winnesheik Ins. Company *vs.* Schuler, 60 Ill., 465.
C. & A. R.R. Co. vs. Buttolf, 66 Ill., 347.
Lavin *vs.* The People, 69 Ill., 303.

And the said Court has uniformly held that the accused had the right to interrogate proposed jurors fully so as to ascertain whether such prejudice was so strong as to probably affect their verdict; and also to advise the accused with reference to determining whether to exercise a peremptory challenge.

See cases last cited.

The record shows the petitioners claimed the same "protection of the law" in the selection of the jury, and asked that persons be excluded therefrom who confessed that they had a prejudice against persons belonging to the classes or societies called Socialists, Communists, and Anarchists, to some of which defendants belonged; and they asked the right to interrogate persons proposed to them as jurors, as to whether their admitted prejudice against the classes named was of such a character as in their opinion would influence their verdict, if it should appear that defendants belonged to such classes. The right to so interrogate such proposed jurors, and the right to challenge them for cause, were alike denied to the petitioners by the said Supreme Court of Illinois, and the decision of said Court was against the right, privilege and immunity so claimed.

For a few of the many instances illustrating the rulings of the trial Court on this point, and the questions asked by petitioners which proposed jurors were not allowed to

answer, see the examinations, etc., of jurors J. H. Cole, Vol. A, p. 137; H. T. Sanford, Vol. H, p. 298; and talesman William Crowley, Vol. A, p. 111; T. H. Dowd, Vol. B, p. 84; John Johnson, Vol. B, p. 140; W. H. Whitehead, Vol. C, p. 64.

The position of the trial Court upon this point was further evidenced by the remarks and rulings on the examination of talesman Shedd, as follows (Vol. A. 425, 426):

Q. (by Defendant's Counsel)—"Have you any prejudice agsinst the class known as socialists, communists or anarchists. A. I have, yes.

Q. "A decided prejudice against them? A. It is.

Q. "I will ask you whether that prejudice would prevent you rendering an impartial verdict in this case, provided it was conceded or proved that the defendants belonged to this class? A. It would; yes sir."

Challenge for cause.

The Court: "I do not think you can make that stick. I know, or the Court judicially knows, what are the objects of the communists, socialists and anarchists. You must presume that I know, because it has been decided that for a man to say that he is prejudiced against horse-thieves is no ground for imputing to him any misconduct as a juror. Now, you must assume that I know, either that anarchists, communists and socialists are a worthy, a praiseworthy class, of people, having worthy objects, or else I cannot say that a prejudice against them is wrong."

The challenge was overruled and defendants excepted, and defendants challenged peremptorily. But after this examination the Court adopted and pursued the policy of refusing to allow the talesmen to be asked whether their prejudice against socialists, communists and anarchists would affect their verdict. (See examination of talesmen Owen Murray, Vol. B, p. 34; T. H. Dowd, Vol. B, p. 87; John Johnson, Vol. B, pp. 142, 143, &c., &c.). All of which rulings of the trial Court were assigned for error in the Supreme Court.

The record further shows, Vol. O., p. 382:

The Supreme Court passing on this claim of petitioners said :

"The juror Sandford further stated that he had a prejudice against socialists, communists and anarchists. This did not disqualify him from sitting as a juror. If the theories of the anarchists should be carried into practical effect, they would involve the destruction of all law and government. Law and government cannot be abolished without revolution, bloodshed and murder. The socialist or communist, if he attempted to put into practical operation his doctrine of community of property, would destroy individual rights in property. Practically considered, the idea of taking a man's property from him without his consent for the purpose of putting it into a common fund for the benefit of the community at large, involves the commission of theft and robbery; therefore the prejudice which the ordinary citizen, who looks at things from a practical standpoint, would have against anarchism and communism would be nothing more than a prejudice against crime. * * * * * *

"Sandford stated, that he would 'Attempt to try the case upon the evidence introduced here, upon the issue which is presented here. The issue presented was, whether the defendants were guilty or not guilty of the murder of Matthias J. Deegan. Any prejudice against communism or anarchism would not render a juror incapable of trying that issue fairly and impartially.' "

Further, in this behalf the petitioners claimed this right and privilege under the following instruction asked by them :

"No person can be legally convicted under the laws of Illinois, on account of any opinion or principles entertained by him. It cannot be material in this case that defendants, or some of them, are or may be Socialists, Communists, or Anarchists, and no prejudice ought to be borne against them on account thereof by the jury, although the jury may believe their doctrines are false and pernicious."

(See vol. O of Rec., p. 12.)

The said Illinois Supreme Court upheld the action of the Trial Court in refusing to give said instruction, thereby deciding adversely to the right, privilege and immunity claimed by the petitioners, and denied to them that "equal protection of the laws" guaranteed to them under the Federal constitution.

(*c*). The Supreme Court of the State of Illinois has heretofore uniformly held that it was improper and illegal for the representative of the people in argument to the jury to go outside of the record, to make unsustained charges against the defendants, and to indulge in vituperation and abuse of the accused, and has held that for such improprieties the cause should be reversed.

See Fox *vs.* People, 95 Ill., 70.
Hennies *vs.* Vogel, 87 Ill., 242.

But in the case at bar, as appears from the record, the prosecuting attorney was allowed by the Trial Court, in the face of objection made, to travel entirely outside of the record, and to make as against the defendants on trial for life, charges and statements having no foundation in the evidence in the record, and was also permitted to indulge in violently denunciatory and abusive language towards the accused.

See Vol. O, Record, pp. 100–113.

This was assigned for error in said Supreme Court of the State of Illinois; but the said Supreme Court upheld the action of the Trial Court in the particulars above referred to, and held that the action of the State's attorney in these regards was not objectionable in this case, thereby deciding adversely to the right, privilege and immunity claimed by the petitioners, and denying to them that equal protection of the laws guaranteed to, and claimed by, them under the Federal Constitution.

(*d.*) The Statute of the State of Illinois provides (Criminal Code, Chap. 38, Section 426, Hurd's Revised Statutes of Illinois, 1885, page 443) as follows:

"No person shall be disqualified as a witness in any criminal case or proceeding, by reason of his interest in the event of the same, as a party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility: Provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the Court permit any reference or comment to be made to or upon such neglect."

Under said statute the Supreme Court of the State of Illinois has uniformly heretofore held that any reference of any kind by the prosecuting attorney to any failure to testify on the part of the accused, was illegal, and that in every such case, any party convicted was entitled to a reversal of the judgment.

But in the case at bar the prosecuting attorney in his closing argument did refer to the failure to testify of certain of the defendants, and to the failure of the defendants to testify upon certain matters, contrary to the provisions of said statute, to which defendants objected and excepted. Yet, the Supreme Court of the State of Illinois, in this case denied to your petitioners the right, privilege and immunity guaranteed to them under the laws, to be exempt from such reference, and decided adversely to the claim of the petitioners in that behalf, and thereby denied to them that equal protection of the laws guaranteed to them under the Federal Constitution.

V.

It is provided by article five of the amendments of the Constitution of the United States, amongst other things, that no person "shall be compelled, in any criminal case, to be a witness against himself."

And by Art. IV. of Amendments of the said Constitution it is provided: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

And by Art. XIV. of Amendments of said Constitution it is provided Sec. 1, Clause 2: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

In like manner, it is provided by Section 10 of Article 2 of the Constitution of the State of Illinois, adopted A. D. 1870 as follows: "No person shall be compelled in any criminal case to give evidence against himself."

Under these constitutional provisions, the petitioners in this case claimed the right, privilege and immunity to be exempt from compulsion to testify against themselves; and that their conviction in a case where they were compelled to give testimony against themselves would be a conviction "without due process of law"; contrary to the guarantee of the Constitution of the United States.

The record shows the petitioners were compelled in this case to give testimony against themselves.

(*a.*) Your petitioners, Samuel Fielden, Albert R. Parsons and August Spies were put upon the stand as witnesses in their own behalf. Thereupon, under pretense of cross-examination, the representatives of the State were permitted, over the objection and protest of your petitioners, to ask of said petitioners above named various ques-

tions, which said petitioners were required by the Court to answer, which questions were not by way of cross-examination, but were upon entirely original and new matter, not referred to nor alluded to upon the direct examination in any way whatever; whereby the said petitioners were compelled to give testimony against themselves under such pretense of cross examination, when on trial for a capital offense, and which testimony said petitioners were also compelled to give, and the same was received, as against all of your petitioners, who were jointly on trial, and were sought to be charged with the crime of murder, as the result of an alleged conspiracy to which your petitioners were claimed to be parties. The Supreme Court of the State of Illinois has heretofore uniformly held that an accused person who took the stand as a witness in his own behalf was entitled to be protected under the Constitution and law of the land in the matter of cross-examination, and that the cross-examination must be confined to the subject-matter of the original or direct examination.

For instances wherein this constitutional guaranty, and the right, privilege and immunity claimed by your petitioners were disregarded, your petitioners call attention to the record Vol. N, 77, 83, 89, 90, 92, 94: Vol. M, 333-337, 350.

Your petitioners show that by the decision of the Supreme Court of the State of Illinois in this cause, your petitioners were denied the right, privilege and immunity to be exempt from compulsion to give testimony against themselves, claimed by them as aforesaid and guaranteed to them under the Federal constitution; and that they were convicted in said cause, and adjudged to be deprived of their lives and liberty respectively, without "due process of law," and also were denied the equal protection of the laws, contrary to the provisions of the Constitution of the United States.

(*b.*) The fourth article of the amendments of the constitution of the United States, provides as follows:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

In like manner the constitution of the State of Illinois, adopted A. D. 1870 by section 6, article 2, provides as follows: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the person or thing to be seized." And such was the provision of the common law before the adoption of either of said constitutions, and such continues to be the common law.

In the case at bar, it appears from the record that the houses and business places of your petitioners were forcibly and violently entered, and searched by the officers of the state interested in the prosecution, without any warrant whatever for such action, such entries and searches being made long after the alleged murder charged against the petitioners. That in connection with such forcible entries and searches, various articles of property belonging to different of your petitioners were seized without warrant or authority by the said representatives of the State, which articles of property were offered and received in evidence in the trial court over the objection and exception of your petitioners; whereby your petitioners through such unlawful conduct upon the part of the representatives of the State, were through their property and effects compelled to give evidence against themselves.

As illustrating the conduct above referred to, the petitioners refer to the record, Vol. I, 345–349, 351–354 and 370; K, 732; Vol. I, 453–456, 466–486, 495–499; Vol. K, 503–509, 511, 515–529.

Particularly as to this unlawful conduct on the part of the representatives of the State, the petitioners call atten-

tion to the action of the Court in allowing to be offered in evidence the letter and postal card alleged to have been written by Johann Most in 1884 to your petitioner, August Spies, which letter and postal had been secured by the prosecution by means of a forcible entry into the Arbiter Zeitung Building, by breaking open the outer doors of said premises, May 5, 1886, without warrant of law, on which occasion the desk of said Spies was broken open and rifled of its contents by the officers representing in such search and seizure the prosecution in this case, and from which desk was obtained the letter and postal referred to, and offered and admitted in evidence over the objection and exception of the petitioners.

See Record, Vol. J, pp. 91–94, 118–126, 267, *et seq.*, 379; Vol. I, 35, 495; Vol. N, 17, 152, 267.

The record shows that petitioners claimed in the Supreme Court of Illinois that such use of their property so unlawfully seized by the representatives of the State was unlawful, and that they were entitled to immunity from such use, under the provisions and protection of the Federal conconstitution. But the said Illinois Supreme Court denied said claim, and decided adversely to such immunity, holding that the remedy of petitioners was by action of trespass against the offenders.

The holding of said Illinois Supreme Court upon this point was as follows (See Opinion, Rec., Vol. O, pp. 338–339):

"It is also assigned as error that the trial court admitted in evidence a letter written to the defendant Spies in 1884 by Johann Most.

"The defendant Spies took the stand as a witness for the defense. Upon his cross-examination the prosecution produced the letter in question, examined him in reference to it, and then offered it in evidence, and it was admitted.

"The main objection is, that after the arrest of Spies, certain letters of his, including this letter, were seized by the police in the *Arbeiter Zietung* building without a search warrant or other legal process, that such seizure was in

violation of the United States and Illinois constitutions, and that the admission of the letter 'was,' in the language of counsel, 'improper, as being in effect a compelling of the plaintiffs in error to give testimony against themselves, contrary to the provisions of the fifth amendment of the Federal Constitution, and to the Federal Constitution, and to the provisions of Article 2 of our constitution of 1870.' In other words, the introduction of the letter is objected to in this Court, as having been in contravention of the principles laid down by the Supreme Court of the United States in Boyd *vs.* The United States, 116 U. S., 616."

Your petitioners show that by reason of the matters aforesaid their conviction was induced "without due process of law;" they were compelled upon their trial to give evidence against themselves; and by the action of the Supreme Court of the State of Illinois in approving the matters above referred to, and by the final judgment of said Supreme Court, your petitioners are adjudged to be deprived of their lives and their liberty respectively, without due process of law. And their privileges and immunities as citizens of the United States were abridged, contrary to the provisions of the 14th amendment of the Federal Constitution, and were also in this behalf denied the equal protection of the laws guaranteed to them under said amendment.

VI.

The Federal Constitution provides amendments, Article 14, Clause 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person the equal protection of the laws."

By Sections 4 and 17 of Article 2 of the Constitution of

the State of Illinois, adopted A. D. 1870, it is provided as follows:

SECTION 4. "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives, and for justifiable ends, shall be a sufficient defense."

SECTION 17. "The people have the right to assemble in a peaceable manner to consult for the common good, to make known their opinions to their representatives, and to apply for redress of grievances."

(*a*) Under these constitutional provisions, and under the law of the land, your petitioners claimed in this cause the right, privilege and immunity of freedom to speak, write and publish upon all subjects, and that they could not be legally convicted of the commission of a particular crime on the ground of any general speech, writing or publication by them, not having in contemplation "the commission of the crime" charged against them.

The State of Illinois, by an Act of the Legislature, approved March 27th, A. D. 1874 (see Hurd's edition, 1885, page 427, Section 274), provided as follows, to wit:

274. "An accessory is he who stands by, and aids, abets or assists, or who, not being present, aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime. He who thus aids, abets, assists, advises or encourages, shall be considered as principal and punished accordingly."

Under this section of this act, petitioners claimed that mere advice, not to do the particular crime charged, but advice to a general revolutionary movement, having in view a change in the existing order of society, by public speech, writing or printing, could not make the petitioners guilty of a particular murder of an individual or individuals never

advised nor committed by them; but that in order to establish their guilt in such a case, such alleged general advice must be accompanied by some encouragement, aiding, abetting or assisting to the particular act. In other words, that there must be some physical act as distinguished from mere general advice, as theretofore held by the Supreme Court of the State of Illinois.

See Cox *vs.* The People, 82 Ill., page 192.

The Supreme Court of the State of Illinois passing on the claim and contentions of the petitioners in this behalf said Record Vol. O. P., 356. "Counsel for plaintiffs in error claims, that instructions No. 5½ given for the estate, was erroneous, mainly for the reasons, to wit: 1st. Because it assumes that mere *general advice* to the public at large to commit deeds of violence, as contained in speeches or publications without reference to the particular crimes charged, and without specifying object, manner, time or place, works responsibility, as for murder. * * * As to this objection, if we construed the instructions to mean what counsel claims it to mean, we would be forced to agree with them, that it was erroneous."

But your petitioners show that the record shows that it was held in the trial court that a conviction could be sustained, on the ground set forth in the claim of petitioners as stated by them in the portion of the opinion above quoted, to wit:

Record, Vol. O. P., 2–3.
Record, Vol. O. P., 4–5.
Record, Vol. O. P., 42–43.
Record, Vol. J. P., 198.
Record, Vol. L. P., 20–21.

But the Supreme Court of the State of Illinois decided against the claim and contention of the petitioners in this behalf, and denied to the petitioners the equal protection of the laws; and also denied to them the right, privilege

and immunity of freedom of speech, and to write and publish as claimed by them; and adjudged your petitioners to forfeit their lives and their liberty respectively without due process of law, and without warrant or sanction of the law of the land, contrary to the provisions of the Federal constitution as aforesaid.

(*b.*) Your petitioners also claimed upon their trial the right, privilege and immunity to be protected and properly guarded in the exercise of their right peaceably to assemble and consult for the general good. In this behalf, petitioners asked the trial Court to give the jury the following instruction:

"The Court further instructs the jury that under the Constitution of this State, it is the right of the people to assemble in a peaceable manner, to consult for what they believe to be the common good, and that so long as such meeting is peaceably conducted, orderly, not tending to riot nor breach of the peace, no official or authority has or can have any legal right to attempt the dispersal thereof in a forcible manner. Such attempt, if made, would be unwarranted, illegal, and might legally be resisted with such necessary and reasonable degree of force, as to prevent the consummation of such dispersal."

"If the jury believe from the evidence in this case that the meeting of May 4th, 1886, was called for a legal purpose, and at the time it was ordered to disperse by the police, was being conducted in an orderly and peaceable manner, and was about peaceably to disperse; and that the defendants or those participating in said meeting had no connection therewith, no illegal or felonious purpose or design, then the order for the dispersal thereof was unauthorized, illegal and in violation of the rights of said assembly and of the people who were then gathered."

"And, if the jury further believe from the evidence the meeting was a quiet and orderly meeting, lawfully convened, and that the order for its dispersal was unauthorized and illegal under the provisions of the constitution of

this State referred to, and that upon such order being given, some person in said gathering, without the knowledge, aid, counsel, procurement, encouragement or abetment of the defendants, or any of them, then or theretofore given, and solely because of his own passion, fear, hatred, malice or ill will, or in pursuance of his view of the right of self defense, threw a bomb among the police, wherefrom resulted the murder or homicide charged in the indictment, then, the defendants would not be liable for the results of such bomb, and your verdict should be not guilty."

But the Court refused to give such instruction, or to guard in any way in the instructions in said cause the rights of your petitioners as to peaceable assemblage, and denied to your petitioners the right, privilege and immunity claimed in that behalf by them. And the said Supreme Court of the State of Illinois in like manner decided adversely to the claim of your petitioners in that behalf, and denied to them in said proceeding the right, privilege and immunity of peaceable assemblage claimed by your petitioners, contrary to the law of the land, whereby was denied to your petitioners that due process of law guaranteed to them under the Federal Constitution as above quoted.

VII.

It is provided by Section 10, Article 1, Paragraph 1st of the Constitution of the United States, amongst other things, as follows: "No state shall * * * pass any bill of attainder, *ex post facto* law"

By Art. VIII. of the amendments of the Constitution of the United States it is provided,

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

And by Art. XIV. of amendments of the said Constitution it is provided, Sec. 1, Clause 2. "No State shall make or enforce any law which shall abridge the priviles or immunities of citizens of the United States."

Article 14 of the amendments of the Federal Constitution provides that no state shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 11 of Article 2 of the constitution of the State of Illinois, adopted A.D. 1870, provides amongst other things: "All penalties shall be proportioned to the nature of the offense," and by Section 14 of the same article, it is provided as follows; "No *ex post facto* law * * * shall be passed."

(*a*) The statute of the State of Illinois (Criminal Code, Chapter 38, section 46—Hurd's revision, 1885, page 389), provides as follows: "If any two or more persons conspire and agree together with a fraudulent and malicious intent, wrongfully and wickedly to injure the person, character, business or property of another, or to obtain money or other property by false pretenses, or to do any illegal act, injurious to the public trade, health, morals, police or administration of public justice * * * or to commit any felony, they shall be deemed guilty of a conspiracy, and every such offender, and every person convicted of conspiracy at common law, shall be imprisoned in the penitentiary, not exceeding three years or fined not exceeding one thousand dollars."

In this case your petitioners were put upon trial, charged with the commission of the crime of murder. The Record shows that a vast amount of evidence was permitted to be offered against them tending to show that they had entered into a general conspiracy to create dissatisfaction or incite hostility towards the Government, and to produce a change in the form thereof by force, which testimony was admitted over the objection and exception of your petitioners,

and which was refused to be excluded upon their motion to that effect.

See, for illustrations, Vol. I., 275–285; 309–323; 380–387; 466–484; 500–503; Vol. J., 85, 86; 140–156; 183–199; 203–217; 222–227; 255–261; 296–300; 374–383; Vol. K., 104–113; 154–158; 498–538; 581–610; 619–626–634–635; 645–650–653–656–659; 707–733.

Upon the close of the said case, the jury were instructed for the people amongst other things as follows: (Instruction 51½)

"If these defendants, or any two or more of them, conspired together with or not with any other person or persons, to excite the people or classes of the people of this city to sedition, tumult and riot, to use deadly weapons against and take the lives of other persons, as a means to carry their designs and purposes into effect, and in pursuance of such conspiracy, and in furtherance of its objects, any of the persons so conspiring, publicly by print or speech, advised or encouraged the commission of murder, without designating time, place or occasion at which it should be done, and in pursuance of, and induced by such advice or encouragement, murder was committed, then all of such conspirators are guilty of such murder, whether the person who perpetrated such murder can be identified or not. If such murder was committed in pursuance of such advice or encouragement, and was induced thereby, it does not matter what change, if any, in the order or condition of society, or what, if any advantage to themselves or others, the conspirators proposed as the result of their conspiracy, nor does it matter whether such advice or encouragement had been frequent and long continued or not, except in determining whether the perpetrator was or was not acting in pursuance of such advice or encouragement, and was or was not induced thereby to commit the murder. If there was such conspiracy, as in this instruction is recited, such advice or encourage-

ment was given, and murder committed in pursuance of and induced thereby, then all such conspirators are guilty of murder. Nor does it matter, if there was such a conspiracy, how impracticable or impossible of success its ends and aims were, nor how foolish or ill arranged were the plans for its execution, except as bearing upon the question whether there was or was not such conspiracy."

Under this instruction, thus given, the only act on the part of any of the plaintiffs in error, required to be found by the jury, was the mere matter of *conspiring* together, or with others, *to excite* the people or classes of the people to riot, tumult and sedition, and to the use of deadly weapons against and taking the lives of other people.

Yet the jury were instructed that if they found your petitioners to have been parties to such a conspiracy, they might find your petitioners guilty of murder; and by other instructions they were advised that under the law they might adjudge your petitioners, if so found guilty, to death, or imprisonment in the penitentiary, not less than fourteen years.

By the admission of such evidence and under these instructions the jury were permitted to, and did, attach to the crime of conspiracy the penalty of death, contrary to the provisions of the Constitution and to the law of the land. The record further shows that the petitioners claimed that the admission of such evidence and the giving of said instruction 5½ was in violation of the rights and immunities of the petitioners as guaranteed to them under the Federal Constitution, and deprived the petitioners of life, liberty, &c. Your petitioners claimed that said instruction was contrary to the law of the land, yet the Supreme Court of the State of Illinois decided adversely to the claim of your petitioners, and adjudged your petitioners to forfeit their lives and their liberty respectively, if found by the jury guilty of conspiracy, contrary to the provisions of the Constitution and the law of the land, "and without due process of law"; and thereby denied to your petitioners the equal protection

of the law as guaranteed by the Federal Constitution and specially claimed by your petitioners. And further, the State of Illinois, through its said Supreme Court, one of the co-ordinate branches of the government of said State, in effect established and passed an *ex post facto* law in said case, applying to the crime of conspiracy, as found against your petitioners under said instruction, the penalty of death and fifteen years in the penitentiary respectively, contrary to the provisions of the Federal Constitution, herein above quoted, and against the claim, right and demand of your petitioners in the premises.

(*b.*) The Constitution of the United States provides, Art. 1, Sec. 10, paragraph first: "No State shall pass any bill of attainder, *ex post facto* law."

Amendment fourteenth, Sec. 1, provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The constitution of the State of Illinois provides, Bills of Rights, Article 2, Section 3: "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations." And Section 4 provides: "Every person may freely speak, write and publish on all subjects."

In this case the record shows the State were permitted by the Court on cross-examination to ask of the defendants

and their witnesses the following questions: "Are you a Socialist, Anarchist, &c."

Cross-examination as to being Socialists, &c.

Vol. M. 335, Samuel Fielden.
Vol. N. 143, Albert R. Parsons.
Vol. N. 16, Michael Schwab.
Vol. N. 86, August Spies.

The record further shows the petitioners requested the Court to give to the jury an instruction in the following words: "No person can be legally convicted under the laws of Illinois on account of any opinion or principles entertained by him. It cannot be material in this case that defendants, or some of them, are or may be socialists, communists or anarchists, and no prejudice ought to be borne against them on account thereof by the jury, although the jury may believe their doctrines are false and pernicious." Which instruction the Court refused to give, and to which the defendants then and there duly excepted.

It was assigned as error in the Supreme Court of the State of Illinois on the part of the trial court in refusing to give the instruction last above recited, to which assignment the Supreme Court said: "If there was a conspiracy it was material to show its purposes and objects with a view of determining whether, and in what respect, it was unlawful. Anarchy is the absence of government. It is a state of society where there is no law or supreme power. If the conspiracy had for its object the destruction of the law and of the government and of the police and militia, as the representatives of law and government, it had for its object the bringing about of practical anarchy. Whether or not the defendants were anarchists may have been a proper circumstance to be considered in connection with all the other circumstances in the case, with a view of showing what connection, if any, they had with the conspiracy, and what were their purposes in joining it. Therefore we cannot say that it was error to refuse an instruction containing

such a broad declaration as that announced in the above quotation."

The record shows that each and every of these petitioners claimed andinsisted that the ruling of said Court in refusing to give said instruction, and the refusal of the Supreme Court to hold that the refusal of the Trial Court was error, was in violation of and repugnant to the Constitution of the United States, which provides that no state shall pass any *ex post facto* law, and that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; and in violation of and repugnant to the provision that no State shall deny to any person within its jurisdiction the equal protection of the laws. But the Criminal Court and the Supreme Court of the State of Illinois, the highest Court of the State, in a final judgment passed in said Court decided that the refusal of said instruction was not in violation of the constitutional provisions guaranteed by the Constitution of the United States and the Constitution of the State of Illinois.

And your petitioners show that this plaintiff in error, Albert R. Parsons (Rec., Vol. N. 138) is a citizen of the United States and entitled to and insists upon and claims the protection and benefit of the Constitution of the United States.

(*c*) The Constitution of the United States, Art. 1, Sec. 10, paragraph first, provides: "No State shall * * * pass any * * * *ex post facto* law" * * *

Amendment of the Constitution of the United States, Art. 14, Section 1, provides: "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." The Constitution of the State of Illinois provides, Art. 2, Sec. 3: "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with

oaths or affirmations." And Section 4 provides: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." Section 14 provides: "No *ex post facto* law, * * * or law making any irrevocable grant of special privileges or immunities shall be passed."

The record shows, that the petitioners, on the trial of this cause, asked the Court to give the following instruction: "No person can be legally convicted under the laws of Illinois on account of any opinion or principles entertained by him. It cannot be material in this case that defendants, or some of them, are or may be socialists, communists or anarchists, and no prejudice ought to be borne against them on account thereof by the jury, although the jury may believe their doctrines are false and pernicious." Which instruction the Court refused to give to the jury, to which the defendants then and there excepted. The Supreme Court of the State of Illinois, the highest Court in the State, passing on defendants' claim that said instruction should have been given, said: "If there was a conspiracy it was material to show its purposes and objects with a view of determining whether and in what respect it was unlawful. Anarchy is the absence of Government. It is a state of society where there is no law or supreme power. If the conspiracy had for its objects the destruction of the law and the Government, and of the police and militia as the representatives of law and Government, it had for its object the bringing about of practical anarchy. Whether or not the defendants were anarchists may have been a proper circumstance to be considered in connection with all the other circumstances in the case, with a view of showing what connection, if any, they had with the conspiracy, and what were their purposes in joining it. Therefore we cannot say that it was an error to refuse an instruction containing such a broad declaration as that announced in the above quotation."

The petitioners claim and insist that the refusal of the Courts of Illinois to give said instruction, and the refusal of

the Supreme Court to hold that the refusal to give the same was error, was in violation of the provisions of the constitution of the United States, which guaranteed petitioners the equal protection of the laws; and was also a further violation in being an *ex post facto* law, and was further a violation of the law of the State of Illinois; granting to all other persons special privileges and immunities in this; that it has been held by the Supreme Court of the State of Illinois, and is and was the law of the State of Illinois at the time petitioner's case was heard, that general reputation was not admissible in evidence against a defendant in a criminal case, unless the defendant in the first instance offered evidence to sustain his general reputation.

And these petitioners, defendants below, did not offer in evidence their general reputation. And your petitioners claim and insist that the ruling of said Court was repugnant to the Constitution of the United States, forbidding any State to pass any *ex post facto* law and forbidding any State to deny to any person within its jurisdiction the equal protection of the laws; but the Criminal Court and the Supreme Court of Illinois, the highest Court of the State in which a decision in your petitioners' case might be had, in a final judgment passed in said Court, decided against the right, title, and immunity claimed by your petitioners, which holding your petitioners' claim was in violation of the Constitution of the United States.

(*d.*) The Constitution of the United States provides, Fourteenth Amendment, Section 1: "No State * * * shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws." The Revised Statutes of the United States, Section 709, provides: "A final judgment or decree in any suit in the highest Court of a State, in which a decision in the suit could be had, where any title, right, privilege or immunity is claimed under the constitution * * * and the decision is against the title, right, privilege or immunity specially set up or

claimed, under such constitution, * * * may be re-examimed and reversed or affirmed in the Supreme Court upon a writ of error."

The record shows that in a certain cause wherein your petitioners were parties defendant and the State of Illinois party plaintiff, as hereinbefore set forth, the trial Court upon the trial of said cause gave to the jury the following instruction: "The statute requires that instructions by the Court to the jury shall be in writing, and only relate to the law of the case. The practice under the statute is, that the counsel prepare on each side a set of instructions, and present them to the Court, and if approved to be read by the Court as the law of the case. It may happen, by reason of the great number presented, and the hurry and confusion of passing on them in the midst of the trial, with a large audience to keep in order, that there may be some apparent inconsistency in them, but if they are carefully scrutinized, such inconsistencies will probably disappear. In any event, however, the gist and pith of all is that if advice and encouragement to murder was given; if murder was done in pursuance of and materially induced by such advice and encouragement, then those who gave such advice and encouragement are guilty of the murder. Unless the evidence, either direct or circumstantial, or both, proves the guilt of one or more defendants, upon this principle so fully that there is no reasonable doubt of it, your duty to them requires you to acquit them; or if it does so prove, then your duty to the State requires you to convict whoever is so proved guilty. The case of each defendant should be considered with the same care and scrutiny as if he alone were on trial. If a conspiracy, having violence and murder as its object, is fully proved, then the acts and declarations of each conspirator in furtherance of the conspiracy, are the acts and declarations of each one of the conspirators. But the declarations of any conspirator, before or after the 4th of May, which are merely narrative as to what had been or would be done, and not made to aid in carrying into effect the object

of the conspiracy, are only evidence against the one who made them. What are the facts and what is the truth, the jury must determine from the evidence, and from that alone. If there are any unguarded expressions in any of the instructions, which seem to assume the existence of any facts or to be any intimation as to what is proved, all such expressions must be disregarded, and the evidence only looked to to determine the facts."

To the giving of said instruction the defendants objected and excepted, and claimed that the same was given in violation of the Constitution of the United States, wherein it is provided that "No State shall deny to any person within its jurisdiction the equal protection of the laws; that it has been held to be the law of the State of Illinois that the giving of such an instruction, as the one here complained of, is erroneous and contrary to the law of the State (McEwen *vs.* Morey, 60 Ill., 32; Town *vs.* Dickey, 7 Northeastern Reporter, 205). That said decisions and the law established thereby were in force at the time of the giving of said instruction, and still remain in full force and effect, unreversed, unrepealed nor superceded; and the giving of said instruction was a discrimination against, and a denial of the equal protection of the laws to, your petitioners, and that the same is repugnant to the Constitution of the United States, and a denial of the rights, privileges and immunities specially set up and claimed by your petitioners under the Constitution of the United States; but the Criminal Court and the Supreme Court of the State of Illinois, the highest Court in this State, in which a decision in the case could be had, in a final judgment, passed in said Court, decided against the right, privilege and immunity specially set up and claimed by your petitioners, and gave judgment against them.

VIII.

(*a.*) The Constitution of the United States provides, amendments of the Constitution, Article 14, Section 1: "No State * * * shall deprive any person of life, liberty or property without due process of law," and further provides, amendment 6: "In all criminal prosecutions the accused shall enjoy the right to * * * be informed of the nature and cause of the accusation." By the statute of the United States, Section 709, it is provided: "A final judgment in any suit in the highest Court of a State in which a decision in the suit could be had, where is drawn in question the validity of * * * statutes of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution * * * of the United States, and the decision is in favor of their validity * * * may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error." The statute of Illinois, Hurd's Edition, 1885, Chapter 38, Sections 274 and 275, provides: Section 274. "An accessory is he who stands by and aids, abets, or assists, or who, not being present, aiding or abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime. He who thus aids, abets, assists, advises or encourages shall be considered as principal and punished accordingly." Section 275 provides: "Every such accessory, when a crime is committed, within or without this State by his aid or procurement within this State, may be indicted and convicted at the same time as the principal, or before, or after his conviction, and whether the principal is convicted or amenable to justice or not, and punished as principal."

By the Constitution of the State of Illinois it is provided, Article 2, Section 9: "In all criminal prosecutions the accused shall have the right * * * to demand the nature and cause of the accusation and to have a copy thereof. * * *"

Under Section 275 it has been held by the State of Illinois

that a person may be indicted as principal, although the proof may be such as to disclose that he was not the principal in the commission of the crime (Kennedy *against* The People, 49th Illinois, 488; Baxter *vs.* The People, 3 Gilman, 382; Dempsey *against* The People, 47th Ill., 326). In this case it is conceded by the Supreme Court of the State of Illinois, the highest Court in the State, that no one of the petitioners committed with his own hands the crime charged against them and whereof they are indicted; as the Court say in their opinion: "It is conceded that no one of the convicted defendants threw the bomb with his own hand." The indictment contains counts based upon the quoted sections of the statutes charging the defendant with being principal in the commission of the crime charged against them. Your petitioners claimed in the State Court that the statute above quoted was inconsistent with, in conflict with, in violation of and repugnant to the provisions of the Constitution of the United States and void, as not informing your petitioners, and not within the scope and meaning of, and not in compliance with the provision of, the Constitution of the United States, that they should be informed of the nature and cause of the accusation. But the Criminal Court and the Supreme Court of the State of Illinois, the highest Court of the State in which a decision in the suit could be had, in a final judgment passed in said Court, decided in favor of the validity of said statute.

(*b.*) The Constitution of the United States provides, Amendment 14th, Section 1: "No State shall * * * deprive any person of life, liberty, or property without due process of law."

Amendment 6 provides: "In all criminal prosecutions, the accused shall * * * be informed of the nature and cause of the accusation."

United States Statutes provide, Section 709: "A final judgment or decree in any suit in the highest Court of a State, in which a decision in the suit could be had, where * * any title, right, privilege, or immunity is claimed

under the Constitution * * * of the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, * * * may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

The Constitution of the State of Illinois provides, Article 2, Section 8: "No person shall be held to answer for a criminal offence, unless on an indictment of a grand jury." And Article 2, Section 9, provides: "In all criminal prosecutions the accused shall have the right * * * to demand the nature and cause of the accusation and to have a copy thereof."

In this case the petitioners were arraigned in the Criminal Court of Cook County and presented with an indictment containing sixty-nine counts. Ten persons were included in the indictment, namely, the eight defendants who are now before the Court, Rudolph Schnaubelt, who has never been brought into Court, and William Seliger. The petitioners were charged with jointly killing Mathias J. Degan with a bomb, with a revolver, with an unknown weapon. Then seriatim each of the defendants was charged in a series of counts with committing murder, first with a bomb, second with a revolver, third with an unknown weapon, the other nine defendants being present, aiding, advising, abetting, or not being present, yet having advised, encouraged, abetted, etc.; and finally the ten defendants were charged with aiding, advising, abetting, or, not being present, with having abetted, advised and encouraged the commission of the crime by an unknown person, first with a bomb, second with a revolver, and third with an unknown weapon. It will be observed from this classification that in three of these counts the defendants on trial, together with Seliger and and Schnaubelt, are charged with having committed the murder, first with a bomb, second with a revolver, and third with an unknown weapon; that in three other of the counts, Schnaubelt is charged with having committed the crime, first with a bomb, second with a revolver, and third with an unknown weapon, the other parties being

present, and aiding, abetting and assisting; and that in three additional counts, Schnaubelt is charged with having committed the crime, the other parties not being present, but having abetted, advised and encouraged its commission.

The murder of Mathias J. Degan was the crime charged against the defendants, and against this charge they were called upon to defend. To make out this charge, the State introduced, over the objection of the defendants, and said defendants in each case excepted to such rulings, a vast amount of evidence, which may be classified as follows: First, testimony tending to show that there was a meeting held by certain parties, including two of the defendants, namely, Fischer and Engel, on the night of May 3d, 1884, the night following what was known as the McCormick riot; at which a certain plan of possible revolutionary warfare was agreed upon, subject to certain contingencies stated in the resolution then adopted: and also testimony of a prior meeting on Sunday, May 2d, at which it is claimed Engel and Fischer were present, which meeting was of some of the members of an anarchistic group called the Northwest-side Group. This testimony was objected to in behalf of the defendants other than Engel and Fischer respectively. Second, at that meeting of May 3d it was resolved to call a meeting for May 4th, to be held at the Haymarket in Chicago, the purpose of that meeting being stated to denounce the action of the police in killing several workingmen at the McCormick riot, so called. Third, the meeting itself of May 4th, and the details of that meeting. Fourth, a vast amount of testimony as to speeches and conversations by various of the defendants, all public, including speeches on the lake front in the City of Chicago, speeches at a hall or meeting place, 54 West Lake Street, at various Turner Halls and other public places in the City of Chicago, and on divers occasions, running through a period of nearly two years prior to the trial. Fifth, there were introduced, substantially, the entire files of the *Arbeiter Zeitung*, a German daily paper, together with the *Fackel*, the Sunday edition of the same paper, for a period

of nearly two years prior to the trial, which were published by the Socialistic Publishing Society, a corporation duly organized under the laws of the State of Illinois; of which paper Spies and Schwab were the principal editors, while Fischer was the foreman of the composing room. No one of the other defendants is affirmatively shown to have had any connection with the paper or with said publishing society. For the same period of time substantially, the State was allowed to introduce the files of the *Alarm*, a paper published in the English language, having its office in what was known as the *Arbeiter Zeitung* building, which paper was edited by A. R. Parsons, one of the defendants, and was published at the expense of the Socialistic Publishing Society. For their services in their editorial work, Schwab and Spies received eighteen dollars per week each, while Parsons received eight dollars per week. But none of the other defendants, namely Engel, Lingg, Fischer, Fielden or Neebe are shown to have had any active participation in the editorial management, or in the publication of the *Alarm*. The State was allowed to read to the jury whatever it chose from the entire contents of the files of those two papers, as against all of the defendants, including not alone the editorial matter of the papers, but communications from correspondents, whose names were signed, articles published from other publications and credited to such other publications, including one article written by a United States Army officer, and reprinted in the *Alarm* from the *Truth*, a newspaper published in San Francisco, California; and even the platform of the International Workingmen's Association, adopted at Pittsburg in 1883, and which was printed in the *Alarm*, and a German translation thereof, printed in the *Arbeiter Zeitung*. Sixth, a book published in New York purporting to be written by Johann Most, and entitled "Science of Revolutionary War." This book seems to be the spelling book in the science of murder, and it was introduced and commented upon notwithstanding no foundation was laid to connect the defendants with either the book or its doctrines. Seventh, various flags

and transparencies or mottoes taken from the *Arbeiter Zeitung* building, some of which were sworn to by witnesses to have been carried in processions of working people or socialists in the city of Chicago on different occasions. Eighth, various weapons, such as guns, revolvers, daggers and bombs of different construction, including two classes, were introduced in court; (A) those claimed to have been traced to the possession of some of the defendants—these were bombs alleged to have been found in Lingg's room or possession—a revolver and dagger found upon the person of Fischer; a single-barrel shot-gun and revolver found in the house of Neebe; some fuse and several fulminating caps, claimed to have been found at the *Arbeiter Zeitung* building: And (B) bombs and weapons of various kinds found in various parts of the city, with which the defendants were in no wise connected, save certain bombs which were alleged to have been manufactured by Lingg. Ninth, a certain construction of galvanized iron, which was pointed out by Engel in his house to the officers, which it is shown was made at least a year before the trial, and which the proof shows beyond a question, had never been used for any purpose. The implement was described by one of the witnesses as a kind of model blast furnace, and a photograph of it appears among the exhibits. In addition to this, there were certain ladles and other matters alleged to have been used by Lingg in connection with the manufacture of bombs, which were also produced in court and offered in evidence. Besides the State was permitted to bring into Court a lot of such material as broken boards, a broken beer keg, and indented metal, which the officers producing the same, testified had been reduced to the condition in which they were presented by the explosion under experiment during the trial of certain bombs like those introduced in evidence. Tenth, there were also offered and received in evidence on behalf of the people, three or four tin cans, which were alleged to be instruments of conflagration.

"And notwithstanding the objection and exception of the

defendants, the Court gave on behalf of the people the following instruction, which is numbered 5½ in the series given on behalf of the people: "If these defendants, or any two or more of them, conspired together, with or not with any other person or persons, to excite the people or classes of the people of this city to sedition, tumult and riot, to use deadly weapons against and take the lives of other persons, as a means of carrying their designs and purpose into effect, and in pursuance of such conspiracy, and in furtherance of its objects, any of the persons so conspiring, publicly by print or speech, advised the commission of murder, without designating time, place or occasion at which it should be done, and in pursuance of, and induced by, such advice and encouragement, murder was committed, then all such conspirators are guilty of such murder, whether the person who perpetrated such murder can be identified or not. If such murder was committed in pursuance of such advice, or encouragement, or was induced thereby, it does not matter what change, if any, in the order or condition of society, or what, if any, advantage to themselves or others the conspirators proposed, as the result of their conspiracy, nor does it matter whether such advice or encouragement had been frequent or long continued or not, except in determining whether the perpetrator was or was not acting in pursuance of such advice or encouragement, and was or was not induced thereby to commit the murder. If there was such conspiracy as in this instruction recited, such advice or encouragement was given, and murder committed in pursuance of and induced thereby, then all such conspirators are guilty of murder. Nor does it matter, if there was such a conspiracy, how impracticable or impossible of success its end and aims were, nor how foolish or ill-arranged were the plans for its execution, except as bearing upon the question of whether there was or was not such conspiracy."

Your petitioners jointly and severally set up and claimed that under the Constitution of the United States and of the State of Illinois, your petitioners jointly and severally were

entitled to be informed of the nature and cause of the accusation, and that they should not be deprived of life, liberty or property without due process of law; and the said indictment in view of the evidence offered and introduced over the objection and exception of your petitioners, jointly and severally, was a violation of such constitutional right claimed by your petitioners; but the Criminal Court of Cook County and the Supreme Court of the State of Illinois, the highest court in the State, in a final judgment in said cause, denied the title, right, privilege and immunity specially set up and claimed by your petitioners, jointly and severally, and held that said indictment and the evidence admitted thereunder, was in compliance with the requirements of the Constitutions, specially set up and claimed by your petitioners.

(*c.*) The mere fact that the indictment contains sixty-nine counts, charging ten different persons as principal, and likewise charging each person as accessory to each one of the other ten, is of itself obnoxious to, and within the inhibition of the constitution of the United States providing for due process of law, in which is contained that a person accused of crime shall be informed of the nature and cause of the accusation; the object of which is that an accused person in a criminal case may know with certainty with what offence he is charged, and to enable him to prepare his defense.

In contemplation of law he is actually required to prepare to defend each count of the indictment. The accused person is not permitted to presume that one rather than another of the counts will be proceeded under by the prosecution. In order, therefore, to meet such indictment as was presented in this case, each defendant was required to prepare sixty nine distinct and different defenses, and thus in this case where eight were on trial, would necessitate, if they saw fit to employ but one attorney, or if their means were such that they could not employ more than one, to prepare five hundred and fifty-two defenses.

(*d.*) The Constitution of the United States provides, amendments, Article 14, Section 1: "Nor shall any State deprive any person of life, liberty or property without due process of law."

The Constitution of the United States, Amendments, Article 6, provides: "In all criminal prosecutions the accused shall enjoy the right to be * * * informed of the nature and cause of the accusation." The Constitution of the State of Illinois provides, Article 2, Section 8: "No person shall be held to answer for a criminal offense unless on an indictment of a grand jury." Section 9: "In all criminal prosecutions the accused shall have the right to * * * demand the nature and cause of the accusation and to have a copy thereof." It is provided by the Statutes of the United States, Section 709: "A final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of * * * any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity * * * may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error." The Statute of the State of Illinois, Hurd's Edition of 1885, Chapter 38, Section 408, provides: "Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury:" which statute was in full force and effect previous to, during the time, and until the indictment was found, and upon which your petitioners were arraigned, and which statute was drawn in question as being invalid and repugnant to the Constitution of the United States, and repugnant to Sections 6 and 14 of the Amendments of such Constitution; but the Criminal Court and the Supreme Court of the State of Illinois, the highest Court of the State in which a final judgment in said cause could be had, in a final judgment passed in said

Court, decided in favor of the validity of said statute, and the record shows that in this case the validity of said statute was challenged as being repugnant to the Constitution of the United States and invalid, and the decision was against the said claim.

Such being the law, the record shows that your petitioners were arraigned on said indictment containing sixty-nine counts; that the petitioners being called upon for their plea in this behalf, moved to quash the said indictment, but the said Criminal Court sustained the same, to which petitioners then and there duly excepted. And the record also shows, that after the trial and verdict, and before judgment, petitioners duly moved in said cause in arrest of judgment, which motion was overruled. That the action of the trial court in refusing to quash said indictment, and in refusing to arrest judgment, were duly assigned for error in the said Supreme Court of Illinois. That said Supreme Court sustained the action of said trial court, and denied to the petitioners the right, privilege and immunity so claimed by them, to be informed of the nature and cause of the accusation against them; and by their final judgment entered in said cause adjudged and ordered the petitioners to be respectively deprived of life, liberty and property, without due process of law, and in denial and disregard of the rights, privileges and immunities claimed by the petitioners under the Federal Constitution as aforesaid.

IX.

By the Constitution of the United States it is provided as follows, to wit:

By Article XIV. of the Amendments of said Constitution, Section 1:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the laws."

By Article VI. of said Amendments:

"In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury."

By Article III., § 2, clause 3, of said Constitution:

"The trial of all crimes, except in cases of impeachment, shall be by jury."

By Article VI., clause 2, of said Constitution:

"This Constitution * * * shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

By the Constitution of the State of Illinois, adopted in 1870, and now in force in said State, it is provided as follows, to wit:

Article II., "Bill of Rights."

§ 2. "No person shall be deprived of life, liberty or property without due process of law."

§ 5. "The right of trial by jury as heretofore enjoyed shall remain inviolate * * ."

§ 9. "In all criminal prosecutions the accused shall have the right to * * * a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

The Statutes of the State of Illinois, Ch. 78, §§ 12 and 13, "Jurors," provide as follows, to wit:

§ 12. " * * * . If for any reason the panel of petit jurors shall not be full at the opening of said Court, or at

any time during the term, the Clerk of said Court may again repair to the office of the County Clerk and draw, in the same manner as at the first drawing, such number of jurors as the Court shall direct, to fill such panel, who shall be summoned in the same manner as the others, and, if necessary, jurors may continue to be so drawn until the panel shall be filled. In case a jury shall be required in said Court for trial of any cause, before the panel shall be filled in the manner herein provided, the Court shall direct the Sheriff to summon from the bystanders, or from the body of the county, a sufficient number of persons having the qualifications of jurors, as provided in this act, to fill the panel, in order that a jury to try such cause may be drawn therefrom. * * * "

§ 13. "When by reason of challenge in the selection of a jury for the trial of any cause, or by reason of the sudden sickness or absence of any juror for any cause, the regular panel shall be exhausted, the Court may direct the Sheriff to summon a sufficient number of persons having the qualifications of jurors to fill the panel for the pending trial; but upon objection by either party to the cause to the Sheriff summoning a sufficient number of persons to fill the panel, the Court shall appoint a special bailiff to summon such persons."

The Record in this case shows, that the "regular panel" of jurors in said Criminal Court of Cook County in the trial therein of this cause was early exhausted, and it became necessary to require the summoning of talesmen to fill the panel and secure a jury for the trial of this cause. Thereupon, to wit: the 29th day of June, A. D. 1887, petitioners herein through their counsel moved the Court in said cause for the appointment of a special bailiff to serve or execute the special venires, and summon the required talesmen: and thereupon Harry or Henry L. Ryce was suggested for such service by the State's Attorney, such selection was acquiesced in by petitioners' counsel, and

said Ryce was duly appointed and sworn as such special bailiff.

See Record Vol. C. p. 185.

Thereafter said Ryce as such special bailiff had the entire charge of the serving of special venires in said cause, and summoned all talesmen: the number of such talesmen so brought into Court by him being over seven hundred, and such service continuing from the date of his said appointment, June 29th, A. D. 1886, until, to wit: July 15th, 1886. Upon moving for the appointment of such special bailiff the Record shows, (Vol. C. p. 185) that petitioners through their attorneys asked the Court to instruct the bailiff as to his duties, that it was the duty of said bailiff "to summon the jurors from the body of the County," and not to make his selections upon the suggestions of outside parties. The Court refused to so instruct said bailiff; but upon such bailiff being sworn, said bailiff inquired (Rec. Vol. C. p. 187): "Your honor, do you want me to select them from all the walks in life, and avocations?" The Court: "You must exercise, I suppose, your own judgment in getting the best class of men. That is all I know about it."

Mr. Black: "I would like to have the suggestions made to Mr. Ryce that it is not a proper thing anyway, to go into a wholesale establishment and ask the employer for men fitted for this position. * * In every instance thus far when an employer has designated a party, it has been evident that the employer has talked with the employe as as to his duty."

The Court: "Ali I can say to Mr. Ryce is that he is appointed special bailiff to summon from the County of Cook fifty men for to-morrow morning and fifty men for Thursday morning, qualified and fit to serve as a juror, and I cannot go with him to see how he does it; but he must exercise his own judgment to get the best kind of men he can."

The Record further shows, that thereafter said bailiff, while summoning talesmen from among bankers, capitalists,

wholesale and retail merchants, brokers, board of trade dealers, clerks, salesmen, &c., excluded in his selections substantially the entire class of daily wage workers, from his special venires.

And thereupon; to wit: on the 14th day of July, A. D. 1886, petitioners by their attorneys, at a moment when, as appears from the record (vol. H., p. 157), talesmen summoned on a new venire by said special bailiff were about to be called, filed in said Court and cause the sworn motion or plea of petitioners, signed and sworn to by all of them, objecting to the swearing of such talesman, and challenging the array of persons so summoned by special Bailiff Ryce, for the special reasons, that said persons were not legally selected and drawn as such talesmen, but at the mere will or caprice of said Ryce, and for the further reason thus stated.

"5. Said persons comprising said venire were selected from a special class of the community as clerks, merchants and salesmen, whereas, this community in the County of Cook, is composed of different classes, including laboring men and skilled mechanics possessed of the statutory qualifications for a juror, and no persons who are either laborers or skilled mechanics have been summoned to act as jurors in this cause."

Said motion, &c., concluded with a verification, and prayed that said venire should be squashed; and in presenting it petitioners, by their attorneys, asked that the State be required to plead, answer or demur thereto; but the Court refused to make any order or take any action whatever therein, and ordered said special venire to be called (Rec. Vol. H., pp. 163–166, Vol. "1", p. 56). To all of which petitioners by their attorneys then and there duly excepted.

And afterwards, to wit: on the 1st day of October, A. D. 1886, petitioners filed in said cause their motion for a new trial (Rec. Vol. O., pp. 52–54), assigning, with others, the following grounds: that the trial was not had before, nor the verdict rendered by, "an impartial jury"; and that

there was misconduct upon the part of the officers of the law in selecting and summoning the jurors in said cause under the various special venires, such jurors not being impartial jurors, but selected with special reference to their known or supposed prejudices against petitioners, "and for the purpose of insuring a conviction."

The Record further shows (Vol. O, pp. 56–63), that in support of said motion for a new trial petitioners filed in said Court and cause their own affidavit, and the affidavit of E. A. Stevens, in support of a written motion, filed on said 1st day of October, A. D. 1886, "for leave to examine Otis S. Favor in open Court," touching the matters referred to in said affidavits, which affidavits were to the following purport:

Petitioners stated, that they were informed and verily believed that said Bailiff Ryce "deliberately and wilfully, and with the avowed intention of making sure of the conviction of these affiants upon said trial, instead of summoning as jurors under said special venires, fair and impartial men from the body of the county as required by law, selected the parties summoned by him from men having prejudice in said cause, and having fixed beliefs as to the supposed guilt of these affiants, as a result of which action petitioners were compelled to receive as jurors men having fixed beliefs as to their supposed guilt." That above can be shown by testimony of said Favor, who refuses to make affidavit, but expressed a willingness to appear and testify if required so to do by the Court. That the substance of what would be sworn to by said Favor, was, that while said Ryce was performing his work as special bailiff, he said to said Favor (who was an intimate acquaintance of said Ryce—and who (as appears from the Record, Vol. C, pp. 339–342), was summoned by said Ryce as a talesman for a juror in said cause), in substance and to the effect, that he (said Ryce) was managing the case against affiants, and knew what he was about; that affiants would hang as certain as death; that he was summoning as jurors men whom affiants would be compelled to challenge peremptorily, whereby affiants

peremptory challenges would be exhausted, and affiants thereby compelled to receive as jurors men satisfactory to the State. That above information reached affiants through E. A. Stevens (whose affidavit was filed) long after the trial, and within a few days theretofore.

The affidavit of Stevens, filed, after stating his acquaintance with Favor, and that he personally knew Favor to be intimate with Special Bailiff Ryce, proceeded as follows, to wit (Vol. O, pp. 62 and 63):

"That affiant has heard said Favor state that said Ryce had said to him, Favor, and to others in his presence, while the said Ryce was so engaged summoning jurors in said cause as aforesaid, in substance and effect as follows, to wit: I (meaning said Ryce) am managing this case (referring to the case of the People against Spies *et al.*), and know what I am about; those fellows (meaning the defendants, Spies *et al.*) are going to be hanged as certain as death. I am calling such men as the defense will have to peremptorily challenge and waste their time and challenges; then they will have to take such men as the prosecution wants. That affiant has requested said Favor to make an affidavit in this cause setting forth the above statements of said Ryce to said Favor, to be used in connection with the motion for a new trial; but the said Favor has refused to do so, stating that he would not take any action in favor of defendants, but that if called as a witness and compelled to testify, he might state the same facts as to what was said by said Ryce, substantially as above stated." Said Stevens further stated that he verily believed that if called and required to testify, said Favor would swear to the matters above set forth.

The Court denied the motion for leave to at once subpœna and examine said Favor, although it was stated (Vol. O, p. 71) that his place of business was within a quarter of a mile of the Court, and no delay was asked in the matter; to which action of the Court petitioners by their attorneys duly excepted (O, 71).

The action of the Trial Court in these particulars was

specially assigned for error in the said Supreme Court of the State of Illinois (Vol. O. pp. 156 and 158; assignments V., VI. and XX): But the said Supreme Court of the State of Illinois, by their final judgment and order in said cause, overruled the claim asserted and advanced by petitioners in this behalf, and denied to your petitioners in the premises the right, privilege and immunity claimed by them respectively of trial by an impartial jury; and by their said final judgment deprived your petitioners respectively of life and property, and of liberty and property, without due process of law, and also denied to your petitioners respectively "the equal protection of the laws" claimed by them; the said judgment and decision of said Supreme Court of Illinois being adverse to and in denial of the rights, privileges and immunities claimed by your petitioners respectively under, and to them guaranteed by, the Constitution of the United States, as above particularly invoked and set forth.

And your petitioners further show, that the said Supreme Court of the State of Illinois entered in said Court and cause a final judgment and order on, to wit: the fourteenth day of September, A.D. 1887, being less than thirty days prior to the first day of the October Term, A. D. 1887, of the Supreme Court of the United States; that the record in said cause still remains in said Supreme Court of Illinois; that said final judgment and order was entered under and by authority of the terms and provisions of § 459 of Ch. 38 R. S. Ills., entitled Criminal Code. That by the terms of said order and judgment your petitioners August Spies, Michael Schwab, Albert R. Parsons, Samuel Fielden, Adolph Fischer, George Engel and Louis Lingg, are ordered and adjudged to be hanged to death by the Sheriff of Cook County, on, to wit: the 11th day of November, A. D. 1887, while your petitioner Oscar Neebe is adjudged to be confined in the penitentiary of the State of Illinois at Joliet, Ills., for the period of fifteen years.

Wherefore, inasmuch as it manifestly appears from the record in said cause, that in the proceedings in said cause had in said Supreme Court of Illinois, the decision of said

Illinois Supreme Court was adverse to, and in denial of, the several claims made and interposed by the petitioners respectively, and the final order and judgment of said Court in terms deprives your petitioners of life, liberty and property respectively, in disregard of the rights, privileges and immunities advanced, set up and claimed by petitioners respectively under the Constitution of the United States and the amendments thereof, and denies to your petitioners rights, privileges and immunities guaranteed and secured to them respectively under said Federal Constitution and amendments. Whereby great wrong, injury and damage hath come to the petitioners August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel, Louis Lingg and Oscar Neebe, respectively, &c.

Therefore, they pray for the allowance of a writ of error herein, and for such such other process as is provided by law, to the end that the errors aforesaid done the petitioners in and by the proceedings, judgment and order of said Supreme Court of the State of Illinois in said cause, and as well by said Criminal Court of Cook County, may be corrected by the Supreme Court of the United States.

M. SALOMON,
W. P. BLACK,
R. A. PRYOR,
J. R. TUCKER,
Attys. for Petitioners.

123-131

123-131

Supreme Court of the United States.

OCTOBER TERM, 1887.

IN RE PETITION OF SPIES *ET AL.*

ADDENDUM.

JUROR THEODORE DENKER.

We assume that the matter printed by the State gives the entire examination and proceedings in connection with the putting of Mr. Denker upon the jury. But, as we understand from the suggestion of the Court on argument, that the Court wishes the entire showing of the record as to Mr. Denker, we submit the following additional matter.

In support of their motion for a new trial petitioners filed, besides their own affidavit, the following affidavits, to wit.

PEOPLE *vs.* SPIES *et al.*

Criminal Court of Cook County. Murder.

"STATE OF ILLINOIS, } ss:
Cook County, }

"Thomas J. Morgan, being duly sworn, on oath says: 'That he is a citizen of the United States and of the State of Illinois, residing at Woodlawn Park, Cook county, Illinois, where he has resided for about four years past, having lived in Illinois since 1869, except two years of residence in the State of Michigan; that he personally well knows T. E. Denker, of Woodlawn Park, who was one of the jurors upon

the late trial of August Spies, Michael Schwab, Albert R. Parsons, Oscar Neebe, Samuel Fielden, Adolph Fischer, Louis Lingg, and George Engel, for the murder of Matthias J. Degan; that on the morning of May 6th, 1886, on the depot platform at Woodlawn Park aforesaid, affiant was conversing with his son and referred to the alleged portrait of August Spies, printed in the Chicago Herald, which was printed in connection with the arrest of said Spies, Schwab, Fielden, Fischer, and others for alleged responsibility in the Haymarket massacre, so called, on May 4th. Affiant stated to his said son that said picture did not look any more like said Spies than it did like affiant, whereupon said Denker stated with much feeling and emphasis, in effect as follows: 'It don't make any difference whether it is like him or not, he and the whole damned crowd ought to be hung'—referring to those reported as arrested, as above mentioned.

"Affiant further states that he is not and never has been an anarchist.

"THOMAS J. MORGAN.

"Subscribed and sworn to before me this 9th day of September, 1886.

"ROLLIN P. BLANCHARD, [SEAL.]
"*Notary Public.*"

"STATE OF ILLINOIS, } ss:
Cook County, }

"Thomas S. Morgan, being duly sworn, on oath says: 'That he is the son of Thomas J. Morgan, whose name is subscribed to the foregoing affidavit, and affiant is now living with his said father, and is working in the patternmaker's department of the Illinois Central Railroad Co. of Chicago; that he has heard read the foregoing affidavit subscribed by his father;' that he is personally acquainted with said T. E. Denker in said affidavit mentioned, and well remembers the incident referred to as occurring on the morning of May 6th, 1886, on the depot platform of Woodlawn Park, Cook county, Illinois, and the remark then made by said Denker; that answering the remark of affiant's father, 'that the picture in the Chicago Herald looked no more like said Spies than it did like said J. T. Morgan;' said Denker said, with much feeling and emphasis, in substance, and, as nearly as affiant can remember, in words as follows: 'It

don't make any difference whether it is like him or not, he and the whole damned crowd ought to be hung,' referring, as affiant understood, to said Spies and the other parties reported in the papers as having been arrested May 5th, 1886, on account of the Haymarket affair.

"Affiant is not an anarchist nor a member of any socialistic, communistic, or anarchistic group or society.

"T. S. MORGAN.

"Subscribed and sworn to before me this 9th day of September, 1886.

"ROLLIN P. BLANCHARD,
"*Notary Public.*"

(See Record, vol. O, pp. 76–78.)

The State filed the affidavit of Denker, to wit:

"STATE OF ILLINOIS, *Cook County:*

In the Criminal Court, September Term.

THE PEOPLE *vs.* AUGUST SPIES *et al.*

"Theodore E. Denker, being duly sworn, on oath says: 'That he was a juror in the above-entitled cause; that he is a resident of Woodlawn Park of this county; that he is the one referred to in the affidavit of Thomas J. Morgan and his son; that he knows Thomas J. Morgan, and has for some time; that one morning, soon after the fourth day of May, 1886, he asked said Morgan if a picture in the newspapers, representing to be a picture of August Spies, was a good or correct likeness of said Spies; whereupon said Morgan replied: 'That it looked no more like Spies than he, Morgan, did,' or words to that effect; that no further remarks were made upon the subject of the picture, or the bomb throwing, or the Haymarket massacre, as this affiant now remembers; that this affiant at that time believed that said Morgan was in sympathy with said Spies, and not desiring to injure his feelings unnecessarily abstained from expressing any opinion whatever; that this affiant never did express the opinion to said Morgan which he has sworn to in his affidavit, although this affiant says, as he said upon his examination, before being accepted as a juror, that he had an opinion, and that he had expressed it. This affiant is informed and believes

that the son of said Morgan mentioned is about thirteen years of age.

"THEODORE E. DENKER.

"Subscribed and sworn to before me this 30th day of September, 1886.

"JOHN STEVENS,
"*Clerk Criminal Court, Cook County.*"

(Record, Vol. O, page 118.)

CORRECTIONS.

Some statements made by Mr. Grinnell in his argument before the Court to-day require correction from the record.

The statute of Illinois governs in the matter of the empannelling and swearing of the jury. There is no provision therein entitling the parties to demand the selection of the entire twelve jurors before swearing any of them. On the contrary the statutory provisions are as follows, as found in sections 21 and 23, chapter 78, Revised Statutes of Illinois, to wit:

§ 21. "Upon the empannelling of any jury in any civil cause now pending or to be hereafter commenced in any court in this State, it shall be the duty of the court, upon request of either party to the suit, or upon its own motion, to order the full number of twelve jurors into the box before either party shall be required to examine any of the said jurors touching their qualifications to try any such cause: *Provided*, That the jury shall be passed upon and accepted in panels of four by the parties, commencing with the State.

§ 23. "The provisions of this act shall apply to proceedings in both civil and criminal cases."

The record in this case shows, in fact, that whenever a panel of four jurors tendered by the State to the defendants was broken by challenge, either for cause or peremptory, the defendants claimed and insisted that the State should

again tender four jurors under the statute—that is, should fill up the panel of four. This claim was denied by the court, to which defendants excepted, and then, under the compulsion of the court, proceeded to fill the broken panel, and when such panel was filled tendered them to the State for examination. It was in this way that defendants were called upon to examine Denker, and after the challenge for cause upon his answers was overruled and their exceptions thereto noted they tendered Denker to the State.

It was said by Mr. Grinnell that this jury was not a class jury, but that three of the jnrors earned their living by manual labor. The record shows the following as to the occupation of the jurors taken:

James H. Cole (Vol. A, 137), last employment book-keeper Continental Insurance Company.

S. G. Randall (Vol. B, page 22), shipping clerk for J. C. Vaughan, seedsman.

Theodore Denker (Vol. B, 115), shipping clerk for Henry W. King & Co., wholesale clothiers.

C. B. Todd, clothing salesman (Vol. B, 277).

Frank B. Osborn (Vol. C, 272) carpet salesman for Marshal, Field & Company, and in charge of the carpet department.

Andrew Hamilton (Vol. D, 251), hardware merchant.

Charles A. Ludwig (Vol. D, pages 343, 348), book-keeper and salesman for Charles L. Page.

J. H. Brayton (Vol. F, page 130), teacher in the public school.

Alanson H. Reed (Vol. G, page 252), piano manufacturer and dealer.

John B. Greiner (Vol. G, page 355), clerk in the Northwestern R. R. freight office, in charge of pool maps.

G. W. Adams (vol. H, page 30), travelling salesman for Geo. W. Pitkin, wholesale paints.

H. T. Sanford (vol H, page 298), clerk in the freight auditor's office of the Chicago & Northwestern railroad.

Mr. Grinnell stated that in every single instance where a talesman had formed or expressed an opinion, who had conversed with persons who were present at the Haymarket affair, the challenge for cause was sustained. The record shows to the contrary in several cases. We call attention to the following:

H. N. Smith (vol. D, p. 302 *et seq.*) stated that he had formed and expressed an opinion touching the question of the guilt of the accused; that he was afraid he would listen a little more intently to testimony concurring with than in conflict with his opinion. He was then asked (p. 303):

Q. Under these circumstances do you think you could render a fair and impartial verdict?
A. I don't think I could.
Q. You think you would be prejudiced?
A. I think I would be prejudiced, because *my feeling is very bitter.*

He distinctly admitted (vol. D, p. 305) that he had talked with persons who were at the Haymarket at the time of the excitement. He was challenged for cause; challenge overruled and exception, and then challenged peremptorily.

So as to Hanna, in whose case the validity of the Illinois jury law was directly challenged as repugnant to the Federal Constitution, as shown in our first printings from the record (pp. 9–12, see vol. G, p. 169), the following occurred:

Q. You say that you talked with a policeman in regard to it (*the Haymarket tragedy*)?

A. Yes, sir.
Q. That was there?
A. Yes, sir.
Q. What was his name?
A. I don't know his name.
Q. He told you about what happened there in a general way, I suppose?
A. In a general way—about the way they marched up and throwed the bomb through the crowd."

Yet in his case also the challenge for cause was overruled, and petitioners were compelled to challenge peremptorily to remove him from the box.

Mr. Grinnell stated in his argument that the record would show in this case that as to three men upon the last panel of four, to wit, Greiner, Reed, and Adams, defendants said in open court, "We accept them." And thereupon turned them over to the State. This is an absolute misstatement.

All that the defendants did as to these three parties was to simply tender them to the State when compelled by the court to fill the panel of four, and as to Mr. Reed and Mr. Adams, they were in the first instance tendered by the State to the defendants. No one of the last panel of four was ever expressly accepted by the defendants. (See vol. G, page 409; vol H, pages 35, 56, 63, 307.)

We desire to repeat, that an inspection of the direct examination of the petitioner, August Spies (vol. N, pp. 17–73), will show that when the State proceeded, over objection and exception, to interrogate him as to the handwriting and receipt by him of the letter and postal dated in 1884, obtained by the State by forcible search and seizure, admitted in this

court to have been without any warrant and wholly illegal; and when the court compelled him to submit to said examination, to identify the letter and postal as from Johann Most, and to admit that they were received by him, such examination was wholly original and not in any sense cross-examination, nor related in any manner to any part of the direct examination.

The State, in fact, made him their own witness as to such examination, and the court thus compelled him to give evidence against himself. Further, said letter and postal were then for the first time received and read in evidence. In other words, the court, in effect, did compel said Spies to identify, and then admitted against him, his own papers, wrested illegally from him—to produce in evidence his own private papers—conduct denounced by this court as in violation of the fundamental rights of an accused person, and characterized by Mr. Grinnell himself as "a high-handed outrage" in his argument. Is not this conviction vitiated by a denial to the petitioners of that due process of law and equal protection of the laws guaranteed by the Federal Constitution; and was there not here an abridgment of the privileges and immunities of a citizen of the United States?

It was proposed to ask Juror James H. Cole, one of the panel of twelve who tried the petitioners, the following questions, which were not allowed to be answered by the court, to which petitioners excepted (Record, vol. A, pp. 139–40):

"Q. This question that I now read to you I don't wish you to answer until the court has passed upon it. You have answered that you are prejudiced against socialists, communists, and anarchists. Upon the trial of this case if it should be established by competent evidence that a meeting of socialist, communists, anarchists, and others was held at

the Haymarket Square, in this city, on the evening of May 4th, 1886, and that a bomb was maliciously thrown by some one in sympathy with such meeting, and in sympathy with the principles advocated by socialists, communists, and anarchists, and that by reason thereof Mathias J. Degan was killed; but if the evidence upon the trial fails to show beyond reasonable doubt that such bomb was thrown by these defendants or any one of them, and that they nor any of them either assisted, aided, abetted, advised, or counseled the throwing of such bomb, would your prejudice against socialists, communists, and anarchists, prevent you from rendering an impartial verdict and acquitting the defendants, or are you now so prejudiced against the classes to which I have referred that you cannot act impartially and fairly as a juryman in this case, under the facts assumed in this question?"

Question refused by the court. Exception by defendants.

Pages 142 and 143:

Q. I will ask you whether you would give as much weight to the testimony of a witness if it appeared that he was a socialist or a communist as you would to any other witness?

Question refused by the court.

Exception by defendants.

Q. Now, all things else being equal, would you give as much credit to such a witness as you would to any other witness?

Question refused by the court.

Exception by defendants.

Q. Is your bias or prejudice against a communist or anarchist such that it would in any way bias you against the testimony of a witness who was a communist or a socialist?

Question refused by the court.

Exception by defendants.

123-131

Supreme Court of the United States

OCTOBER TERM, 1887.

In the matter of the petition of August Spies et al. for a Writ of Error to the Supreme Court of Illinois.

The defendants, petitioners, rely upon the following transactions, evidence, and rulings in the court on the trial of the defendants, and which are taken from the transcript of the record, as duly certified by the clerk of said court, which copy is produced in court here for verification.

Record, Volume A, June 21st, 22d, and 23d.

Page 33. Panel of four jurors tendered to defendant. Adjourned to 2 P. M.

Examination of jurors in behalf of defendants as follows:

Mr. FOSTER (for defendants). "If I remember correctly, you stated your name was Aldrich?"

* * * * * *

Q. Do you remember the occasion of your hearing of the difficulty that occurred at the Haymarket square?—A. Yes; I saw it in the paper next morning.

Q. Have you been constantly reading the daily papers from that time to this in reference to these cases?—A. I have; yes.

Q. You have also, as I remember your answer to Mr. Grinnell, held frequent conversations with persons in regard to the occurrence at the Haymarket square?—A. Yes.

Q. I will ask you, from all the information you have received, whether it was by word of mouth or whether it was by reason of communications published in any or all of the papers at the time that you had these communications, or read them,

formed an opinion upon the question of the defendants' innocence or guilt?—A. Of some of them; others I don't remember the names at all, because I have not followed it?

Q. You formed an opinion upon that question as to some of the defendants?—A. Yes.

* * * * * * *

Q. I will ask you whether anything has transpired between that time and this, which in your mind changed the opinion which you then formed upon that occasion?—A. No, sir.

Q. You have that opinion now?—A. Yes.

Q. I will ask you whether it would require evidence from witnesses sworn upon the trial of this case to overcome the opinion which you now have?—A. It would.

Q. So, then, you would go into the trial biased to such an extent that it would require sworn testimony to overcome the opinion you now have and the conclusion?—A. Yes; I think it would.

Q. I will ask you farther if, after having formed this conclusion, or opinion, you expressed it to any one?—A. I presume I have.

Q. Probably how many times? (No answer).

Q. Your best judgment now is that you not only formed a conclusion and an opinion, but you expressed it to different persons to whom you communicated?—A. Yes, sir.

Challenged for cause by defendants.

THE COURT. He has not been asked whether he had expressed any opinion of the truth of the narrative contained in the newspapers on either side. Did you ever express any opinion, Mr. Aldrich, as to the truth of the newspaper reports?—A. I don't know that I ever have.

THE COURT. There is a recent case in which the Supreme Court have acted on this section of the statute. They have said that the statute as it reads literally is to be enforced; the statute provides that, although a person called as a juryman

may have formed an opinion based upon rumor or upon newspaper statements, but has expressed no opinion as to the truth of the newspaper statement, he is still qualified as a juror if he states that he can fairly and impartially render a verdict thereon in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement. It is not a test question whether juror will have the opinion which he has formed from newspapers changed by the evidence, but whether his verdict will be based only upon the account which may here be given by witnesses under oath.

Mr. Foster. I will ask the juror a few more questions.

Q. At the time that you heard of this Haymarket affair, did you believe it?—A. I did; yes.

Q. And at the time that you read these various newspaper accounts, containing the narration of what occurred there—the throwing of that bomb and the killing of Mr. Deegan—did you believe them?—A. I did; yes.

Q. So, then, the conclusion you have arrived at is formed from the communications to you in these various ways which you at the time believed?—A. Yes.

Q. Now was it upon this belief that you expressed the opinion which you then formed?—A. Yes.

Q. It was in view of your belief that the statements you have heard and read were true?—A. It was.

Q. And that is the opinion which you now have?—A. Yes.

Q. Now at the time you expressed the opinion, or the opinion that you say you probably frequently expressed, did you express the opinion that the statements you have heard were true?—A. Yes, I think I did.

Q. You think you did?—A. Yes.

Q. I understood you to say that you have never expressed any opinion as to whether the newspapers were true or not?

The Court. That is upon the truth of the reports which you had heard about the transaction?—A. Yes, sir.

The Court. If that be so, it is different. The question now is whether you have ever expressed any opinion as to the

truth of the rumors or the reports or the statements which you heard or read—as to whether they were true narratives of the event or not?—A. I think I did; because I had conversations with a policeman who was present at the time, in regard to the matter, and I had something more than newspaper statements to go upon.

Challenged for cause by defendant.

Examination of W. N. UPHAM by defendants, volume A, page 50.

* * * * * * *

Q. Did you form any opinion from all sources, from what you read and what you heard, upon the question of the defendants' guilt or innocence, or any of them, that are charged with this crime?—A. I think I did in regard to some of them.

Q. Did you express the opinion which you then formed?—A. I could not say positively, but I presume I did; I don't know that I did.

Q. When you heard these statements and read the accounts, did you believe them to be true?—A. In the main.

* * * * * * *

Page 51:

Q. And this view was touching the defendant's guilt or innocence, or some of them?—A. Yes.

Q. Then you expressed that to others?—A. I probably did. I talked about it.

* * * * * * *

Challenged for cause. Challenge overruled.

QUESTION BY THE COURT. The question is whether you have ever formed or expressed any opinion as to the guilt or innocence of any one of these eight men of the murder of officer Deegan?—A. I cannot say what I have expressed in words, but my opinion was that some of them are guilty.

THE COURT. That is not any ground of challenge under the law.

Mr. FOSTER. I will interrogate him a little further.

Page 52:

* * * * * * *

Q. I will ask you whether you have the opinion which you then formed, now?—A. Yes.

Q. And no circumstance occurred to change it?—A. I have not read or learned of any circumstance that changed it.

Q. I will ask you whether it will require sworn testimony to overcome the opinion which you now have before you will be unbiased and free to act upon the testimony?

Objected to.

THE COURT. That is the same question you had before.

Q. Would it require now testimony to unbias the opinion which you now have?

THE COURT. That is a question as to his opinion of the operation of his own mind. You have got the fact, as he says, that he did form and express an opinion, and that the opinion which he then formed and expressed was his opinion; he has got it yet. Now, as to any opinion based upon that, what would be the effect of certain operations, that is a matter immaterial. You are entitled to a juror who will base his verdict entirely upon the facts, regardless of anything he may have heard heretofore, who is to act only upon the testimony of witnesses as they may be presented here.

Mr. BLACK. We are entitled, if your honor please, in the selection of a juror, to the legal presumption of innocence in favor of the defendants. Now, as to this juror, that presumption has already been overcome.

THE COURT. The legal presumption of innocence don't mean that each individual juror, as he sits down shall believe that the man is innocent. The legal presumption of innocence has

not at all anything to do with the mind of the juror. The legal presumption of innocence is that no man shall be found guilty until his guilt is established beyond all doubt by the proofs; that is an abstract presumption of innocence. Whether a juror can fairly and impartially try a case cannot be found out by asking him what he thinks would be the operation of his mind hereinafter.

Exception by defendants.

THE COURT. What is the present state of his mind the juror knows; what it will be at any time hereafter he cannot know; what it will take to put in any different stage hereafter he cannot tell.

* * * * * * *

Page 56:

Mr. Upham was challenged for cause by defendants; challenge overruled, to which defendants excepted, and challenged peremptorily.

Examination of FRANK JACOBSON by defendants, commencing volume A, page 252.

Page 256:

Q. Now, at the time you read these newspaper accounts and heard these statements in the shop, on the streets, at the house, and elsewhere, did you at the time form an opinion upon the question of the guilt or the innocence of these defendants, or any of them?—A. I did.

Q. Have you that opinion now?—A. I have.

Q. Have you ever expressed that opinion to anyone?—A. I have.

Q. Did you tell them that you believed the statements that you heard were correct?—A. I never stated that I believed those statements were correct.

Q. Well, do you now believe that the statements you read in the newspaper and that you heard on the street were correct? —A. I do. Those are the only means of information, and I believe they are correct.

Q. Then you state that from those newspaper statements that you read, and from the conversations that you had, you formed an opinion upon the question of the guilt or innocence of these defendants?—A. Yes, sir.

Q. That you have that opinion?—A. Yes, sir.

Q. And that you believe that the statements that you read and heard were true?—A. Yes, sir.

Counsel for defence thereupon challenged said juror for cause.

THE COURT. * * * The statute contemplates that that statement of the belief in the correctness of the report is a statement which is made of his own motion, without anybody questioning him here about it in court. I don't mean that he shall here be questioned about it, and then what he says here determine it.

Mr. FOSTER. Now, if you honor please, that would practically say that what a gentleman at random on the street dropped by word of mouth was of more solemn and graver character than what he states here under oath in the presence of the court. It seems to me that the statute is broad enough to cover it when he says he now believes to-day the statements which he read, he now believes the statements heard, and that he now has an opinion from what he heard and read.

THE COURT. Save the point; I will overrule the challenge.

To which ruling defendants excepted (p. 259), and thereafter the defendants challenged said juror peremptorily (page 262).

Upon examination of RUSH PATTERSON by defendants, commencing volume F, p. 56, the following occurred:

* * * * * * *

Q. You have read and heard of the Haymarket meeting?—A. I have, sir.

Q. Have you formed an opinion upon the question of the guilt or innocence of the accused, or any of them, of the murder of Mr. Deegan, the policeman, who was killed by the explosion of the bomb?—A. Yes, sir; I naturally formed an opinion upon that.

Q. Have you expressed that opinion to others?—A. In general discussion among those I associate with, I have.

Q. With other employés of the store, I suppose?—A. Yes, and outside acquaintances.

Q. You still entertain the opinion, I suppose; that is, you have had nothing to remove it?—A. No, sir.

Q. Do you think that opinion would influence your verdict in any degree if you should be selected as a juror to try the case?—A. It would, sir, have considerable weight with me; that is to say, if you will allow me to explain. This opinion is simply formed upon the reading of the newspapers, and it is pretty deeply rooted—the opinion is—and it would take a large preponderance of evidence to remove it.

* * * * * * *

Page 61:

Q. Did you say it would require a preponderance of evidence to find the defendants guilty, or a preponderance of testimony to remove the opinion that you have?—A. It would require the preponderance of evidence to remove the opinion that I now possess.

* * * * * * *

Page 62:

Q. * * In a criminal case they have got to not only produce a preponderance, but they must establish their propositions, and every one of them by testimony sufficient to satisfy the jury beyond all reasonable doubt. Now, would you

follow that theory?—A. Well, it is just this, Mr. Foster; you know I feel like every other citizen does feel, a feeling that these men are guilty; we don't know which. We have formed this opinion by general reports and the newspapers. Now, with that feeling, it would take some pretty positive evidence to make me think these men were not guilty, if I should acquit them. That is what I mean.

* * * * * * *

Page 63:

Q. But you say it would take positive evidence of their innocence before you should consent to return them not guilty?—A. Yes, sir; I should want some strong evidence.

Q. Well, if that strong evidence of their innocence was not introduced, then you would want to convict them of course?—A. Certainly.

* * * * * * *

Q. You suppose that if the testimony was evenly balanced your present opinion would convict them?—A. I think it would.

Thereupon the defendants challenged said Patterson for cause, which challenge (page 66) was overruled; defendants excepted, and challenged Patterson peremptorily.

Examination of LEROY HANNA by defendants, volume G, commencing page 164.

Page 165:

Q. You have heard and read of the Haymarket meeting?—A. Yes, sir.

Q. The explosion of the bomb and the killing of Mr. Deegan, have you?—A. Yes, sir.

* * * * * * *

Q. Do you know anything about the principles contended

for by socialists, communists, and anarchists ?—A. Well, something of it, but I haven't investigated it very much, sir.

Q. Do you know anything about what they claimed to know, whether you have a prejudice against them or not ?—A. Yes, sir.

Q. You have a prejudice against them ?—A. I have a prejudice against them.

Q. Now, from all sources of information which you have received, from any and all sources, and all prejudices that you may have, do you know of anything which would influence your determining this case upon the testimony, and the testimony only, if you should be selected as a juror, or would that be biased and your verdict be prejudiced by any bias which you now have, or opinion ?—A. I think that my verdict might be biased some—opinion might be biased.

Q. Your answer would be then that you could not act upon the proof that was presented here in court, and that alone, and be influenced by the bias now existing in your mind. Is that your condition of mind ?—A. Yes, sir.

Thereupon defendants challenged said Hanna for cause.

Page 169 :

The court overruled said challenge and thereupon the defendants further interrogated said Hanna as follows :

Q. You say that you talked with a policeman in regard to it (the Haymarket tragedy) ?—A. Yes, sir.

Q. That was there ?—A. Yes, sir.

Q. What was his name ?—A. I don't know his name.

Q. He told you about what happened there in a general way, I suppose ?—A. In a general way, about the way they marched up, and they throwed the bomb through the crowd.

Q. Did he tell you anything about who had made speeches ?—A. No, sir ; he didn't mention that.

Q. Didn't say anything about Mr. Spies or Mr. Parsons or Mr. Fielden?—A. No; he did not mention those in particular.

Q. You have heard those names before, haven't you?—A. O, yes.

Q. So, then, your opinion, such as you have, has reference to those names, to the persons that bear those names?—A. Yes, sir; all the opinion I have has reference to the parties that bear those names.

Q. And the prejudice that you speak of that you have, it applies also to these defendants or some of them?—A. Yes, sir; and the principles they advocate.

Q. It applies to Mr. Spies, Mr. Parsons, and Mr. Fielden?—A. Yes, sir.

Q. And that prejudice, you say, is so strong that you do not know whether you would be influenced by it or not, when you come to consider of the testimony and the charge of the court as I understand it?—A. It would have some influence on me, probably, but I am prejudiced against the principles that they agitate.

Q. And by reason of the prejudice against the principles, you are prejudiced against these names, against the persons that I have mentioned?—A. Yes, I am.

Q. Now, then, the prejudice that you have against the defendants is such that you do not know whether your verdict would be influenced by it or not, as I understand it?—A. That is the way I feel; I don't know but what we deceive ourselves sometimes when we say we believe so and so.

Q. Yes, I know we do. It is not a question of how you will feel after awhile, but do you now believe that your prejudice against the defendants, or some of them, is such that your verdict would probably be biased?—A. It might be biased, and I might be aware of it.

Q. It might be, and you cannot say whether it would be or would not be?—A. That is it.

Thereupon said challenge was renewed and the following occurred.

Mr. Salomon. Now, if your honor please, we desire to call the court's attention briefly (to the statute.) We have gone over it quite a number of times, but it seems to me that there is a constitutional provision governing the qualification of a juror. That provision is found both in the United States Constitution and the constitution of the State, that a defendant shall be entitled to a trial by an impartial jury. Now, of course, an impartial jury is composed of impartial jurors. Now, what is an impartial juror? It means a man who is not prejudiced against these defendants at the beginning of the case; who sits here fairly, uninfluenced, unbiased by any feeling or by any inclinations against them at the beginning of this case. Now, this has been stated strongly by the Supreme Court of this State in the 56th Illinois—in the case of the Railroad Company *v.* Adler, or Adler against the Railroad Company, and also in the Virginia case which I have here, and would call your honor's attention to, if the court cares to take up the time to hear the opinion. Now, this statute, plainly to our way of thinking, takes away, or attempts to take away, the partiality of the juror. In other words, it attempts to make a partial juror impartial and competent, if he himself says that he believes he can fairly and impartially try the case, notwithstanding he already says that he has a fixed and decided opinion and a prejudice against the defendants.

The Court. Well, as to the constitutionality of the statute, the Supreme Court have expressed their approval of it, so that that is out of the question. What the Supreme Court have said is constitutional, a court of inferior degree has no right to say afterwards is not constitutional.

Mr. Salomon. The Supreme Court have said in different cases time and again——

The Court. Save the point upon it.

Mr. Salomon. Well, we desire to have the record show that we base the objection on the statute as being in conflict with the constitutional provisions.

To which ruling of the court counsel for the defence then and there excepted.

W. B. ALLEN examined by defendants, commencing volume C, page 110.

Q. Have you read and heard about the Haymarket tragedy?—A. Yes.

Q. From what you have heard and read, did you form an opinion as to the guilt or innocence of some one of these defendants or more?—A. YES.

Q. Have you that opinion now?—A. YES.

Q. Did you express it to others?—A. YES.

Q. Frequently?—A. Yes.

Q. Is that a strong opinion?—A. YES.

* * * * * * *

Q. I will ask you whether what you have formed from what you have read and heard is a slight impression, or an opinion, or a conviction, perhaps?—A. IT IS A DECIDED CONVICTION.

Q. You have made up your mind as to whether these men are guilty or innocent?—A. YES.

Q. It would be difficult to change your conviction, or impossible, perhaps?—A. YES.

Q. It would be impossible to change your conviction?—A. IT WOULD BE HARD TO CHANGE MY CONVICTION.

Said Allen was challenged for *cause* by defendants (page 111), and said challenge was overruled, to which defendants excepted and then challenged peremptorily.

The defendants claim that Mr. Salomon here raised the point as to the constitutionality of the proceedings of the court and the statute of Illinois as applied to the selecting and impaneling of a jury, both upon the violation of the State and Federal constitution, and that by these proceedings defendants have been deprived of an impartial jury which was their right under both constitutions.

After the court had made the last ruling upon the constitutional objections so raised by Mr. Salomon, the following proceedings took place:

CHARLES ROBERTS examined by defendants (commencing volume H, p. 90):

Q. You have heard and read of the Haymarket meeting and the killing of this policeman?—A. Yes.

Q. Have you formed an opinion upon the guilt or innocence of the defendants of the offence, or any of them?—A. Yes.

Q. Do you still entertain that opinion?—A. Yes.

Q. And have communicated it to others?—A. Yes.

Challenged for cause by defendants.

Cross-examined by the State, he further says:

* * * * * *

Q. Have you any opinion as to whether or not these defendants, or any of them, are guilty of that crime?—A. Yes, decidedly.

* * * * * *

The challenge for cause was overruled, and thereupon the defendants challenged peremptorily (page 92).

A. NELSON, examined by defendants (commencing volume H, page 114):

Q. You have read of the Haymarket meeting?—A. Yes, sir.

Q. And have formed an opinion, I suppose, as to the guilt or innocence of these defendants of the murder of the Mr. Deegan, the policeman who was killed by the explosion of the bomb?—A. Yes.

Q. You still have that opinion?—A. Yes.

Q. And have expressed it to others ?—A. Yes.

Q. It is a good firm conclusion that you have come to on that question, I suppose ?—A. Yes.

Challenged by defendants for cause.

Examined by Mr. INGHAM for the State :

Q. Is your opinion based upon what you have read in the newspapers ?—A. Yes.

Q. And upon anything else ?—A. No, sir.

Q. You have an opinion as to whether an offence was committed ?—A. Yes.

Q. Have you any opinion as to whether any one of these men are guilty of that offence ?—A. I have.

Q. That opinion is based upon newspapers entirely ?—A. Yes.

Q. You believe you could try this case fairly and impartially upon the law and the evidence ?—A. Yes, I think I could.

Q. Did you ever tell anyone that you believed the statement of facts which you read in the newspapers to be a true statement of facts.—A. No, sir, I don't believe I did.

Challenge overruled, and exception by defendant. Challenged peremptorily by defendants.

W. F. CONKLING (volume H, page 182), examined by defendants :

Q. You know what case is on trial here ?—A. Yes.

Q. And the charge against the defendants ?—A. Yes.

Q. Have you formed an opinion as to their guilt or innocence ?—A. Yes.

Q. A decided opinion ? A. Yes.

Q. And still entertain it ?—A. Yes.

Q. And communicated it to others ?—A. Yes.

Challenged by defendants for cause.

Mr. Ingham.

Q. Is your opinion based on what you have read in the newspapers.—A. Yes, sir.

Q. You believe you could try the case fairly and impartially, and return a verdict upon the evidence?—A. Yes.

Q. Have you ever told anyone that you believed the statements of facts which you read in the newspapers to be a true statement of facts?—A. No, sir.

The Court.

Q. Do you know either of these eight men sitting in the row there?—A. No, sir; I do not.

Q. Did you ever see any of them before you came here?—A. No, sir.

Q. Then you have no personal hostility or ill-will toward any of them? The only feeling you have against them grows out of what you have heard and read in conversation?—A. Yes.

Challenge for cause overruled, and challenged peremptorily by defendants.

Charles Roberts (volume H, page 219) examined by defendants.

Q. Have you an opinion as to the guilt or innocence of the defendants, or any of them?—A. Yes.

Q. Strong one?—A. Yes, sir.

Q. Expressed it to others?—A. Yes, sir.

Q. Still entertain it?—A. Yes, sir.

Q. One that would influence your verdict if you were a juryman in the case, would it?—A. I think it would.

Counsel for defendant thereupon challenged for cause.

Page 221:

Court overruled said challenge for cause, to which defendants excepted. Upon further examination, the following appears:

* * * * * * *

Q. But you say that your opinion is such that you now believe—as you know your own mind—that it would influence your verdict in the case?—A. Yes, sir; from what I have read since the occurrence.

Counsel for defence again challenged for cause, which challenge was overruled, and defendants challenged peremptorily.

The foregoing are but a few of the very many examinations appearing in the record, in connection with which, and in overruling defendants' challenges for cause, the court applied and enforced the interpretation and exposition of the statute of 1874. For other illustrations we refer to the examinations cited in our petition herein.

As this rule was applied to jurors who served in this case, we cite the following illustrations from the record:

Theodore Denker, one of the panel who tried the cause, examined by defendants, commencing volume B, page 112:

Q. Have you formed an opinion upon the question of the defendants' guilt or innocence on the charge of murder, or any of them?—A. I have.

Q. Have you expressed that opinion?—A. I have.

Q. You still entertain it?—A. Yes.

Q. You believe what you heard and what you read?—A. I believe it; yes.

Q. Is that opinion such as to prevent you from rendering an impartial verdict in the case, sitting as a juror, under the testimony and the law.—A. I think it is.

Mr. Denker was challenged for cause by the defendants.

The challenge was overruled, to which defendants excepted. (Page 113).

H. T. SANFORD examined by the defendants.

Mr. FOSTER. What is your name?—A. H. T. Sanford.

Q. Where do you reside, Mr. Sanford?—A. Oak Park, eight miles out of the city.

* * * * * * *

Q. You know what case is on trial now, I presume?—A. Yes.

Q. Have you an opinion as to the guilt or innocence of the defendants, or any of them, of the murder of Matthias J. Degan?—A. I have.

Q. You have an opinion; you say you have formed an opinion somewhat upon the question of the guilt or innocence of these defendants, you mean, or that there was an offence committed at the Haymarket by the throwing of the bomb?—A. Well, I would rather have you ask them one at a time.

Q. Have you an opinion as to whether or not there was an offence committed at the Haymarket meeting by the throwing of the bomb?—A. Yes.

Q. Now, from all that you have read and all that you have heard, have you an opinion as to the guilt or innocence of any of the eight defendants of the throwing of that bomb?—A. Yes.

Q. You have an opinion upon that question also?—A. I have.

* * * * * * *

Q. You believe you could fairly and impartially listen to the testimony that is introduced here?—A. Yes.

Q. And the charge of the court, and render an impartial verdict, you believe?—A. Yes.

Q. Have you any knowledge of the principles contended

for by socialists, communists, and anarchists?—A. Nothing except what I read in the papers.

Q. Just general reading?—A. Yes.

Q. You are not a socialist, I presume, or a communist?—A. No, sir.

Q. Have you a prejudice against them for what you have read in the papers?—A. Decided.

Q. A decided prejudice against them? Do you believe that that would influence your verdict in this case, or would you try the real issue which is here, as to whether these defendants were guilty of the murder of Mr. Deegan or not, or would you try the question of socialism or anarchism, which really has nothing to do with the case?—A. Well, as I know so little about it in reality, at present it is a pretty hard question to answer.

Q. You would undertake, you would attempt, of course, to try the case upon the evidence introduced here, upon the issue which is presented here?—A. Yes, sir.

Q. Now, that issue, and the only issue which will be presented to this jury, unless it is presented with some other motive than to arrive at the truth, I think is, did these men throw the bomb which killed Deegan. If not, did they aid, abet, encourage, assist or advise somebody else to do it? Now, that is all there is in this case; no question of socialism or anarchism to be determined, or as to whether it is right or wrong. Now, do you believe that you can try it upon that theory and return a verdict upon that theory and upon that issue?—A. Well, suppose I have an opinion in my own mind that they encouraged it?

Q. Keep it; that they encouraged?—A. Yes.

Q. Well, then, so far as that is concerned I do not care very much what your opinion may be now, for your opinion now is made up of random conversation and from newspaper reading, as I understand it?—A. Yes.

Q. That is nothing reliable. You do not regard that as being in the nature of sworn testimony, at all, do you?—A. No.

Q. Now, when the testimony is introduced here and the witnesses are examined and cross-examined, you see them and look into their countenances, judge who are worthy of belief and who are not worthy of belief. Don't you think then you will be able to determine the question?—A. Yes.

Q. Regardless of any impression that you might have, or any opinion?—A. Yes.

Q. Have you any opposition to the organization by laboring men or their associations, or societies, or unions, so far as they have reference to their own advancement and protection, and are not in violation of law?—A. No, sir.

Q. Mr. Sanford, do you know any of the members of the police force of the city of Chicago?—A. Not one by name.

Q. You are not acquainted with anyone that was either injured or killed, I suppose, at the Haymarket meeting?—A. No.

* * * * * * *

Q. Now, Mr. Sanford, if you should be selected as a juror in this case, do you believe that regardless of all prejudice or opinion which you now have you could listen to the legitimate testimony introduced in court, and upon that, and that alone, render and return a fair and impartial, unprejudiced, and unbiased verdict?—A. Yes.

Mr. Foster. Upon the question, on the record in this case, if your honor please, we desire to present a challenge for cause to this juror, but we do not urge it, but present it upon the ground that he has formed and expressed an opinion.

The Court. (To State's Attorney): Do you want to examine him?

Mr. Black. We understand, Mr. Stevens (addressing clerk of the court), that your tallys show that our peremptories are exhausted.

The Clerk (Mr. Stevens). Yes, sir.

Mr. Grinnell. Does yours show that, too?

Mr. Black. The same thing; yes.

* * * * * * *

Mr. Ingham. Mr. Sanford, upon what is your opinion

founded; upon newspaper reports?—A. Well, it is founded on the general theory, and upon what I read in the newspapers?

Q. And what you read in the newspapers?—A. Yes, sir.

Q. Have you ever talked with anyone who was present at the Haymarket at the time the bomb was thrown?—A. No, sir.

Q. Have you ever talked with anyone who professed of his own knowledge to know anything about the connection of the defendants with the throwing of the bomb?—A. No.

Q. Have you ever said to anyone whether or not you believed the statements of facts in the newspapers to be true?—A. I have never expressed it exactly in that way, but still I have no reason to think they were false.

Q. Well, the question is not what your opinion of that was. The question simply is—is it a question made necessary by our statute perhaps?—A. Well, I don't recall whether I have or not.

Q. So far as you know, then, you never have?—A. No, sir.

Q. Do you believe that if taken as a juror you can try this case fairly and impartially and render a verdict upon the law and the evidence?—A. Yes.

Mr. Ingham. We submit that the challenge is not well taken.

The Court. Well, it was not supposed to be well taken if my former ruling had been right.

Mr. Foster. The challenge is overruled?

The Court. Yes.

Mr. Foster. Defendants except.

[*It thus appears that at the time this juror Sanford was forced upon us, all the peremptory challenges were conceded to have been exhausted, so that the defence had to submit to be tried by this juror.*]

[*The record shows that when the last four jurors who served*

upon the panel, to wit, A. H. Reed, J. B. Greiner, G. W. Adams, and Mr. Sanborn, were called for examination, the court had, by repeated adjudications in this case, settled the rule of qualifications for jurors under the statute, by which rule the said four persons were good and competent jurors. For this reason no challenge for cause was interposed as to them other than Mr. Sanford. Furthermore, the record shows that, when said four jurors were called to be sworn upon the panel, the defendants' peremptory challenges had been exercised and exhausted. The record further shows that said panel of four jurors was never, in fact, accepted by the defendants; but they were ordered by the court to be sworn to try the cause as against the defendants and without their assent (vol. H, pp. 307, 312). *The attitude of said four jurors as to prejudice and partiality in said cause and toward the defendants is exhibited by their examinations on the* voir dire *as follows, to wit:*]

The examination of Mr. Sanford has already been fully presented.

JOHN B. GREINER (vol. G., p. 355) examined:

Q. You have heard and read of the Haymarket meeting on the 4th of May last?—A. Yes, sir.

Q. Heard of Mr. Deegan being killed, and other policemen, by the explosion of the bomb?—A. Yes, sir.

Q. Have you formed an opinion upon the question of the guilt or innocence of the defendants now on trial of that affair?—A. I have formed an opinion based on newspaper reports; yes.

Q. Is that an opinion as to the commission of that offence, or the connection of the defendants with the offence?—A. I do not exactly grasp the distinction that you make.

Q. The distinction is this—whether or not your opinion is that an offence is committed at the Haymarket meeting merely,

or whether it is that the defendants are connected with that offence?—A. Well, it is evident that the defendants are connected with it from their being here, as far as that is concerned.

Q. You regard that as being evidence?—A. Well, evidence—well, I don't know exactly. I of course would expect that it connected them or they would not be here.

Q. * * * So, then, the opinion that you have has reference to the guilt or innocence of some of these men, or all of them?—A. Certainly.

Q. Now, is that opinion one, Mr. Greiner, that would influence your verdict if you should be selected as a juror to try the case, do you believe?—A. I certainly think it would affect it to some extent; I do not see how it could be otherwise.

* * * * * *

Vol. G, p. 357:

Q. * * * Now, do you think that you can lay aside your opinion, and lay aside all prejudice which exists in your mind, and act upon the testimony, and that alone, and render a verdict which is absolutely impartial?—A. I think I could do so.

Q. You believe you could do so?—A. I do.

Alanson H. Reed (vol. G, 253) examined by the State:

Q. Mr. Reed, you have an opinion, I suppose, as to whether an offence was committed or not at the Haymarket?—A. Certainly.

Q. Have you any opinion as to the guilt or innocence of these eight men, or any of them?—A. Nothing, excepting from newspaper reports, of course.

Q. Notwithstanding the opinion which you have, based upon what you read in the newspapers, do you believe that

you can give them a fair and impartial trial upon the evidence here?—A. I should, sir.

Q. Base your verdict on that?—A. Yes, sir.

Cross-examined by defendants, Vol. 9 (p. 265):

Q. Was the opinion which you formed upon the question of the guilt or innocence of these defendants simply from what you read, or would it have any connection with what you have heard?—A. It is, altogether.

Q. Principally from which, if you can tell?—A. Well, of course, the basis of it was newspaper talk, because probably the people that I talked with—the majority of them—had got their information from the same source, so far as I know.

George W. Adams, tendered by the State, was cross-examined by defendants, and in such cross-examination the following transpired (vol. H, p. 39):

Q. Were you in Chicago on the 4th of May?—A. I was not.

Q. When did you return to Chicago?—A. Some time about the middle of July; I don't know the exact day.

Q. You heard, I suppose, of the occurrences at the Haymarket when you were away?—A. I did.

Q. Did you read it in the Chicago papers?—A. Yes, partly in those and partly in the Michigan papers.

Q. And after returning I suppose you conversed frequently with your friends in regard to the Haymarket meeting, and what had occurred there, or what was supposed to have occurred there?—A. Yes.

Q. You formed an opinion that an offence was committed at the Haymarket?—A. Yes.

Q. Did you form an opinion at the same time that the defendants were connected with or responsible for the commission of that crime?—A. I thought some of them were interested in it, yes.

Q. And you still think so?—A. Yes.

Q. Nothing has transpired in the interval to change your mind at all, I suppose?—A. No, sir.

Upon further examination Mr. ADAMS said (p. 43):

Q. Notwithstanding the opinion which you now have upon the question of the guilt or innocence of some of the defendants, is your mind in the condition in which you can say now that you can try this case upon the testimony, and only upon the testimony, which may be introduced in court?—A. Yes.

[*Petitioners now ask leave to refer the court to the motion of defendants for a new trial after verdict upon various grounds, one of which is stated in the following language, to wit:*

"7. *The trial of the above cause was not had before, nor was the verdict thereon rendered by an impartial jury.*

"11. *The court erred in its several rulings as to qualification of jurors and their competency, and in refusing to allow defendants to ask of the jurors certain questions proposed to be put to them, and also in allowing to the State more than twenty challenges in the cause.*"

Record, vol. O, pp. 53–4.

It will be seen that this motion was based on exceptions to the rulings of the court upon the selection and empaneling of the jury, and upon the ground of objection made by defendants, of which one, as thus made applicable to all of said rulings, was the conflict of the statute of Illinois

with the Federal Constitution, and thus raising the question of the conflict of that statute with the Federal Constitution in respect to each and every ruling of the court upon challenges by defendants of talesmen for cause.]

There is now presented such parts of the record as will show the grounds of the objection to the examination of August Spies by the State, compelling him to be a witness against himself, and to furnish evidence against himself; and that evidence obtained by search of his premises and house, and unlawful seizure of his papers, and the introduction of other evidence and papers obtained by unlawful search and seizure.

The record shows, vol. J., page 118, BARTHOLOMEW FLYNN, a witness for the people, examined in chief by Mr. Grinnell, testifies as follows:

Q. You are a police officer, are you?—A. Yes, sir.

Q. How long have you been on the police force?—A. 14 years.

Q. Were you at the *Arbiter Zeitung* office in company with Jones on the 5th day of may last?—A. I was.

Q. Well, what did you find; did you search there?—A. I did.

Q. Tell me what you found where you searched.—A. I was in company with officer Jones at time we searched the desk of Mr. Spies as we supposed, we found a lot of fuse, some caps, some letters, also some dynamite sticks.

Q. Open that box of letters there and see (handing witness a cigar-box containing letters).

* * * * * * *

Q. Now what about the letters?—A. Those letters I also found in the drawer. I took the letters, put them in this box,

carried them to the station, and delivered them to Mr. Furthman.

Q. Well look at that and see if they are as you found them?

Mr. SALOMON. We object to this.

THE COURT: The question now is whether they are as he found them?

Mr. GRINNELL. I can put Mr. Furthman on later if there is any question about it.

Q. You delivered them into the hands of Mr. Furthman?—A. I did.

Q. He delivered them into your hands again to-day?—A. Yes, sir.

Q. Are they in the same condition now as when Mr. Furthman delivered them to you this morning?—Well from the appearance they are.

Re-direct examination by Mr. GRINNELL, page 124:

Q. Mr. Flynn, where was the room in which the desk was located from which you took these things?—A. It was in the front, on the second story.

Q. That is the story above the saloon?—A. Above the saloon, and in my recollection, Mr. Grinnell, you were there yourself.

THE COURT. Well, that does not make any difference.

Mr. GRINNELL. You have the letters here that you took from that desk?—A. Yes, sir.

Q. Where were these letters in reference to that desk, that you have got here?—A. They were in the desk.

Q. How did you get into the desk?—A. The desk was pried open.

Q. Was it locked? Did you have to unlock it or get into it before you could get the letters?—A. Yes; we had to pry it open by a locksmith that was there; taken there by somebody. I could not tell who.

Volume J, page 91.

WILLIAM JONES, a witness called on behalf of the people, being duly sworn and examined in chief by Mr. GRINNELL. testified as follows:

Q. You are a police officer?—A. Yes, sir.

Q. Belong to the detective office?—A. Yes, sir.

Q. Were you at the *Arbiter Zeitung* office?—A. I was.

Q. What hour in the morning?—A. About 8.30 in the morning.

Q. Did you make a search of the building?—A. I did—assisted in making a search.

Q. Well, what did you find?—A. I first searched the house, and I found a number of circulars, two different description of circulars. I was also present when officer Myers found this form (referring to type); that on the table end of the room where the type-setters were working. After taking those circulars to the station, I went back and commenced searching; a locksmith was present; some person sent for a locksmith to open the different drawers in the different offices in the *Arbiter* building. I called on the locksmith to open the drawer of the desk in the corner; he did so.

Q. The desk in the corner of which room, which floor?—A. On the first floor; I think it is the first floor in the office, Spies' office.

* * * * * * *

A. I was going to say in regard to the desk—I asked some clerks or some men there in charge, I don't know who they were, which was Mr. Spies' desk afterwards.

Objected to.

MR. GRINNELL. Were you in court the other day when I asked James Bonfield in regard to a bunch of keys?—A. Yes, sir.

Q. Well is this the bunch of keys? (Showing witness keys.) —A. That is the keys I got from him.

* * * * * * *

Mr. GRINNELL. I will offer in evidence the bunch of keys and these articles here.

Cross-examination by Mr. BLACK.

* * * * * * *

Q. How many times did you visit the *Arbiter Zeitung* building on May 5th?—A. I made several trips; probably five or six.

* * * * * * *

Q. You were with the party of officers who arrested Mr. Spies and his brother, Mr. Schwab?—A. Yes, sir.

Q. You had no warrant for their arrest at that time?—A. No, sir.

Q. And you had no search warrants after going through the building, had you?—A. I had none.

Q. When you returned on your second visit the drawers in the various desks were locked?—A. Yes, sir; they were locked.

Q. Sent for the locksmith and had them opened?—A. Yes, sir; sent for the locksmith; the locksmith was there for that purpose—sent for.

Q. What hour of the day was that?—A. Well, that must have been noon, or probably after.

Q. Was it at that visit, or at an earlier visit, that you sent for a locksmith?—A. I did not send for a locksmith.

Q. Well, the locksmith was sent for, or put in an appearance?—A. I could not say; he was there when I came back after I took some things to the station.

Q. You found him there?—A. Yes, sir; I found him there with his tools, ready to work.

What else was there in that drawer, if you remember?—A.

There were a number of letters directed to Mr. Spies. I see his name on them and circulars; I saw one or two, not circulars, but newspapers, folded up and directed to him. The other officers took charge of those papers, I believe.

Another witness, Louis Hass, called on behalf of the people, testified as follows, vol. J, page 267.

Direct examination by Mr. Grinnell.

Q. You are a police officer?—A. I am. Been on the police force between 6 and 7 years; was at the *Arbiter* office on the 5th of May last about half-past ten in the morning; I made an inspection of the building.

Q. How long after Spies was arrested that you first went in the building and searched it over?—A. Spies had been arrested before that time; I don't recollect I went with other officers from the central station under the command of Chief Ebersold and Lieut. Shay to go through the *Arbiter Zeitung* office, to go up there and see what there was in the building. We went there from the station, went up stairs, and the first room we went to was the office, on the floor above the saloon.

The record shows, vol. J, as follows (page 346):

Officer James Bonefield, a witness produced on behalf of the people, after being duly sworn, testifies as follows:

I am a police officer, and have been between five and six years; am a brother of Captain Bonefield, the inspector of police. I made the arrest of defendants, August Spies and Mr. Schwab, at 105 and 107 Fifth avenue; it used to be called the *Arbiter Zeitung* office.

Q. You may state what occurred, what was said, and what you did?

Objected to on behalf of all the defendants. Objection overruled and defendants excepted.

A. It was the morning of the 1st of May I got up in the office, and a gentleman pointed out Mr. Spies to me. I told Mr. Spies I would like to see Mr. Schwab, to speak to both of them. I did not know Mr. Schwab. He was sitting down, and he called him over. He came over. I told them I was an officer, and placed them both under arrest. August Spies' brother came up; I also placed him under arrest, and then officers Riley and Duffy came in, and we took them to the Central Police Station.

Q. You told Spies and Schwab to consider themselves under arrest?—A. Yes, sir. There was no resistance or opposition to me by either of the gentlemen. When I got acquainted with them I whistled and officer Riley came running up.

Q. Did you have any warrant for their arrest with you at that time?—A. I had not.

Q. There had been, so far as you know, no complaint made against them before any magistrate up to that time?—A. None that I know of.

Q. And no warrant, so far as you know, had ever been issued for their arrest?—A. None that I know of.

Q. Who else did you put under arrest at that building at that time besides Spies and Schwab?—A. When I was talking to Spies and Schwab another gentleman came up and asked them some question. I asked Mr. Spies who it was; he said it was all right, it was his brother. I said all right, he had better come along, too.

Q. You arrested his brother?—A. Yes.

Q. Did you have a warrant for his arrest?—A. No, sir.

Q. Had any complaint, to your knowledge, been made against him to any magistrate?—A. None that I know of.

Q. You had no search warrant at the time that any of these were taken?—A. No, sir.

Q. And in going through the building and taking away

these things you had no warrant of any kind?—A. Not a thing.

Q. When you got to the Central station with Spies and Schwab what did you do with them?—A. I took them into the front room, and Lieut. Shay sent out for the chief, and in the meantime we searched him and took the personal effects away from him (pointing to Spies).

Mr. GRINNELL. I wish to bring your attention to one thing that is just brought to my attention; did you take that from him (referring to a bunch of keys)?—A. That was among the things that I got in Mr. Spies' pocket.

Mr. BLACK:

Q. You took Mr. Spies' keys out of his pocket?—A. Everything I found; little slips of paper and everything I found.

Q. You literally went through him?—A. Yes.

Q. You had no warrant for anything of that kind?—A. No, sir.

Q. You had no warrant for anything that you did that day, had you?—A. No, sir; my own responsibility; I will stand by it now.

* * * * * * *

Page 379:

Redirect by Mr. GRINNELL:

Q. You took those keys from August Spies at that time (indicating)?

Volume I, page 495:

EDMUND FURTHMAN, a witness for the people, having been duly sworn, was examined-in-chief by Mr. GRINNELL, and testified as follows:

My name is Edmund Furthman; I am an assistant in the State's Attorneys Office. I was at the *Arbiter Zeitung*

office soon after the Haymarket massacre, I think about 11 o'clock, between 11 and 12, on the 5th of May. I have seen all the matter that has been shown Mr. Fricke, the last witness. It has been in my possession since the day I was there. I obtained it there in the type-setting room. The room was used as a type-setting room and was full of desks containing cases of type, and there were several tables there covered with stone, and at every case I suppose where the men were working was a hook containing a lot of manuscript, which I took away. When I got there the doors were locked. I took about twenty or twenty-five of the Revenge Circulars from there.

Cross-examination by Mr. BLACK:

Q. Mr. Furthman, you say the doors were locked when you reached there?—A. They were.

Q. What hour was that?—A. Between 11 and 12.

Q. How did you get in?—A. We got in after the doors were opened.

Q. How did you open the doors, and who opened them?—A. By a locksmith.

Q. Sent for a locksmith, did you?—A. Yes.

Mr. GRINNELL. I sent for him.

Mr. BLACK. Did you have any warrant for entering those premises at that time?—A. Not at all.

Q. And you went there as the representatives of the law, did you?—A. I suppose so.

Q. To enter, in violation of law, the office of that paper, without a search warrant?

Objected to; objection sustained.

Q. You did enter without a search warrant, did you?—A. We did.

Q. Was there anybody there when you took these things away from there?—A. No, sir.

Q. And did you carry away anything else besides these papers?—A. Yes, we carried two mail bags away from there.

Q. What did you do with those?—A. We took them over to the State's Attorney's office.

Q. Was there anything in them?—A. We placed all this manuscript into them.

Q. Did you find anything else in them besides this manuscript?—A. There is a lot there of manuscript yet that I have not examined.

Q. That you have not examined. Tell me again, for I forget for the moment, what hour was it of the day that this was done?—A. To the best of my recollection it was between eleven and twelve I think.

Q. Who made up the party that was engaged in this entering and in the carrying away of this property?—A. Mr. Grinnell, the State's Attorney, and Officer Haas, Lieut. Kiplet and myself.

Q. Do you know whether or not before entering those premises by the convenient aid of a locksmith, the question of the propriety of such an entry without a search warrant was discussed between the parties?

Objected to.

Mr. Black. The question is, whether the question of the propriety was discussed?

The Court. It cuts no figure.

Mr. Grinnell. I stand on the criticism.

Mr. Black. We are not trying the State's Attorney for his anarchy now.

Mr. Grinnell. I am willing to be tried for that act.

The Court. Well, that is not a subject of investigation here, whether the State's officers have done anything that they ought not to have done, or omitted to do anything that they ought to have done. That is not a subject of inquiry here.

Mr. Black. I am glad to learn that there is something that is not being inquired into here, may it please your honor.

THE COURT. If there were no reasonable grounds of suspicion then such an act would be a gross outrage.

MR. BLACK. The question of suspicion does not figure in the least under the laws of the State of Illinois.

THE COURT. Reasonable ground of suspicion.

MR. BLACK. That does not figure in the laws of the State of Illinois. If you want to enter premises and search them you have got to get out your warrant to search them; without that you can't, nor any other officer of the law.

THE COURT. Well, whether you can't or not, that is not a subject of inquiry here.

MR. BLACK. Very well; then we will stop there.

Q. Now, you say you have had this manuscript in your personal possession from that day to this?—Yes, sir.

Q. You brought it up here with the court, did you, to-day? A.—Yes, sir.

Q. You have been continuously in the State's Attorney's office, as an assistant, from that day to this, have you?—A. Yes, sir.

Further appears from the records, vol. N, page 17.

AUGUST SPIES, one of the defendants, called as a witness on his own behalf, was asked on cross-examination by Mr. Ingham on behalf of the prosecution.

Q. Do you know Herr Most?—I do.

Q. How long have you known him?

Objected to; objection overruled; exception by counsel for defendants.

A. I guess three years.

Q. Look at the letter which I now show you.—A. Yes, sir.

Q. Who is that from?—A. That is from——

Q. Most?—A. Herr Most.

* * * * * * *

Mr. INGHAM. When did you receive that letter?—A. I th'nk I will read this. (Witness reads the letter).

Q. Did you answer that?—A. I can't remember; I do not know.

Q. How long have you been in correspondence with Most?

Objected to as not proper cross-examination.

Q. In whose handwriting is that postal card? (Showing witness postal card).

Objected to any inquiry regarding the postal card.

THE COURT. The witness in his examination-in-chief testified that he frequently addressed labor organizations. Whether that was in the interest of the laborer, or whether it was a stepping stone to overturn society; whether he was in good faith endeavoring to shorten the hours of labor, or whether the real object was beyond, is admissible.

Mr. BLACK. On cross-examination he said he has frequently addressed labor organizations. He said about the 4th of May he had been frequently addressing labor organizations, the result of which he was very much excited, and for that reason he did not propose to make a long speech.

THE COURT. But there was more than that, if I remember. He said there was a difficulty about remembering what he said because he had made so many speeches. And the same thing as to Parsons—that there was a difficulty as to determining as to what was said on a particular occasion because there was so many.

Mr. SALOMON. That was as to remembering what Parsons said on the night of May 4th.

THE COURT. Not Parsons himself, but what he himself said. At any rate in his examination in chief in some form it did appear that he had been making a great many speeches to labor organizations.

Mr. BLACK. These letters are letters that go back to 1884?

THE WITNESS. 1883.

Mr. GRINNELL. The context of the letter would show that it was 1884.

Mr. BLACK. There is no doubt about it being 1884.

THE COURT. Yes, I think the examination as to those papers is admissible.

Defendants' counsel then and there excepted to the ruling of the court.

Q. In whose handwriting is that postal card?

THE COURT. What has been done about the postal card?

Mr. INGHAM. Nothing.

THE COURT. Has he been asked whether he received it?

Mr. INGHAM. No.

THE WITNESS. It is Most's handwriting.

Mr. INGHAM. Did you receive it?—A. I suppose I did; I see my address on it.

Q. Don't you know whether you did or not?—A. I do not; I don't remember having read it.

Q. Do you remember this letter?—A. I don't remember at this date; no.

Q. You can't remember now whether you ever read it or not; don't you know you got this letter?—A. I do not. I suppose I did; it is addressed to me, I see.

Q. Will you swear that you have no recollection of having received that letter?

Objected to.

A. I suppose I did receive that letter.

Q. Don't you know you received it?—A. It seems to me I did.

Q. Don't you know you did, Mr. Spies; can't you tell from the contents that you read it before?—A. No, I can't tell from that.

Q. Read the request it made to you, and see if you can't tell whether you received that letter?

Objected to.

THE COURT. By looking at the contents he can see whether it refreshes his memory.

THE WITNESS. I don't remember the contents of that letter. I don't remember whether I answered it or not. I never carried on any correspondence with Most. I never answered the postal card. I do not remember whether I wrote anything to Most in regard to the inquiries made of me in this letter. I do not remember having given him directions where to ship the material mentioned in the letter.

* * * * * * *

Vol. N, page 102:

MR. INGHAM. We offer the letter in evidence. The letter referred to as Most's letter.

Objected to by the defendants.

MR. GRINNELL. Use a little reason and sense on the admissibility of this letter. It appears that this letter is in the writing of Johann Most. The testimony in proof here is that he is the editor of a paper called the *Freiheit*. Translation from the *Freiheit* are in the *Alarm*, also in the *Arbeiter Zeitung;* it also appears in *Truth* that Johann Most is the writer of a book called the "Science of Modern Warfare, or Revolutionary War." It appears this letter is in the handwriting of Most.

MR. BLACK. There is no evidence in this case that the letter was found in his possession.

THE COURT. Letters and papers found in the custody of a person indicted for high treason may be read on his trial to prove any overt act of rebellion, though not themselves any part on which the Crown intends to reply. Letters which have

never been in the possession of the defendant cannot be admissible in evidence against him.

Mr. BLACK. There is no evidence in this case that the letter was found in his possession.

THE COURT. He says he received it.

Mr. SALOMON. If your honor please, before finally passing upon the question, we would like to have an opportunity to look up the law and see whether this letter should be admitted.

THE COURT. There isn't any doubt about it. Letters addressed to a person and received by him and not destroyed are admissible if they relate to the subject-matter under investigation. How much weight is to be attached to them depends on a great variety of circumstances. Read your translation.

Defendant's counsel then and there excepted to the ruling of of the court.

It further appears from the record Vol. N, page 267, as follows:

EDMUND FURTHMAN, a witness called and examined on behalf of the people was examined-in-chief by Mr. Grinnell and testified as follows:

Look at this letter and this postal card and say where you got them?

Objected to.

Mr. GRINNELL. They are the letters that were introduced yesterday. The examination of one of the witnesses placed on the witness-stand proved that these letters that were shown him were found on Mr. Spies' desk and found in the desk locked up.

THE COURT. Whether he received those letters and how they passed from his possession into yours is competent.

Mr. GRINNELL. That has been proven by Mr. Spies.

THE COURT. This is not a proper inquiry.

Mr. GRINNELL. I wish to offer to show that the letters now shown to witness and heretofore admitted in evidence have been in his possession ever since they were handed to him by officer Flynn, who testified to taking them from Spies' desk on the 5th of May last.

Mr. INGHAM. We want to show that. We offer to prove that.

The Supreme Court of the State of Illinois passing upon the claim and contention of petitioners, that they were subjected to illegal search and seizure and compelled to give evidence against themselves, in violation of the Constitution of the United States and the State of Illinois, says, vol. O, page 334:

"Various errors are assigned upon the record. These errors relate to the evidence introduced. * * * It is claimed that the trial court admitted improper testimony. * * * It is assigned as error that the trial court admitted in evidence a letter, written to the defendant Spies in 1884, by Johann Most, the author of the treaties above referred to. The letter is set out in the statement which prefaces this opinion. The defendant Spies took the stand as a witness for the defence; upon his cross-examination the prosecution produced the letter in question, examined him in reference to it, and then offered it in evidence and it was admitted. The main contention is that after the arrest of Spies, certain effects of his, including this letter, was seized by the police in the *Arbeiter Zeitung* office without a search warrant or other legal process; that such seizure was in violation of the United States and Illinois Constitutions, and that the admission of the letter 'was,' in the language of counsel for plaintiffs in error, 'improper as being in effect a compelling of the plaintiffs in error to give testimony against themselves contrary to the provisions of the 5th amendment of the Federal Constitution, and to the provisions of article 2 of our constitutions of 1870.'"

In other words, the introduction of the letter is objected to in this court, as having been in contravention of the principles laid down by the Supreme Court of the United States in

Boyd *v.* United States (116 U. S., 616). In that case an act of Congress authorizing the Federal courts to require parties charged with violations of the revenue laws to produce their books, invoices, and papers for inspection and for use in evidence against themselves, was declared to be unconstitutional. In the case at bar the defendants were not required to produce the letters; the State had the letter and produced it. We will not attempt, however, to draw any distinction between this case and the Boyd case. We do not think that the record is in such shape as to permit counsel to make the point urged by them before this court. In the first place, it is not clear from the testimony that the letter from Most was seized by the police in the manner suggested. Early in the trial two police officers testifying for the prosecution stated that on May 5, 1886, they took possession of a number of articles found in the office of the *Arbeiter Zeitung* newspaper, among which were certain letters lying on the desk occupied by Spies, and certain other letters in the drawer of the desk. But it nowhere appears in the record, so far as we can find, that this particular letter from Most to Spies, introduced near the close of the trial, was among the letters so taken from the top of Spies' desk or among those taken from the drawer of it. For aught that appears to the contrary this letter may not have come to the hands of the State through the alleged illegal seizure complained of, but may have been obtained in some other and legitimate matter. We cannot infer that because certain letters were seized by the police that Most's letter must have been one of them. On the trial below counsel for the defence took the position that the letter was not found in the possession of Spies. We find the following statements in the record of what occurred when the trial judge passed upon the offer to introduce the letter.

THE COURT. * * * Letters which have never been in the possession of the defendant cannot be admissible in evidence against him.

Mr. Black. There is no evidence in this case that the letter was found in his possession.

The Court. He says he received it. This brings us to the second reason why the point now under consideration cannot be made here. The objection that the letter was obtained from the defendant by an unlawful seizure is made for the first time in this court. It was not made on the trial in the court below. Such an objection as this which is not suggested by the nature of the offered evidence, but depends upon the proof of an outside fact, should have been made on the trial. The defence should have proved that the Most letter was one of the letters illegally seized by the police and should then have moved to exclude or oppose its admission on the ground that it was obtained by such illegal seizure. This was not done, and therefore we cannot consider the constitutional question supposed to be involved.

23-131

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

IN THE MATTER OF THE PETITION

—OF—

AUGUST SPIES, ET ALS.,

FOR A WRIT OF ERROR TO THE SUPREME COURT OF ILLINOIS.

Petitioners desire, upon the argument ordered by the Court upon this application, and in connection with matter heretofore printed from the record for consideration upon their petition, to submit and call attention to the following further matter, appearing upon and from the record of said cause, in the Supreme Court of Illinois, and the transcript thereof now presented:

I.

The record shows that by the testimony of Theodore Fricke (vol. I, pp. 466–494) a large amount of manuscript was identified as by Spies, Schwab, Parsons, Rau, and per-

haps others; also Most's Science of Revolutionary War was identified, and the files of the *Arbeiter Zeitung*, *Fackel*, *Verbote*, and *Alarm*. All this evidence was duly objected to and exceptions noted, followed by a motion to exclude, which was overruled, and defendants excepted. Thereupon Edmund Furthman, assistant State's attorney, was called as a witness (vol. I, pp. 495–499), by whom it was shown that all the matter shown to and identified by Fricke was seized by the witness at the *Arbeiter Zeitung* building May 5, 1886, and had remained thence continuously in his possession until the date of his testifying. On cross-examination he admitted that the search of the *Arbeiter Zeitung* building on May 5, 1886, and the seizure of the material referred to were without any warrant of any kind, and that the doors were locked when the searching and seizing party reached the building, and the doors were opened by a locksmith sent for for that purpose (p. 497), and that the party that was engaged in this entering and carrying away of this property consisted of Mr. Grinnell and others (p. 498). Thereupon Eugene Seegur (vol. N, p. 500, *et seq.*) was called as a translator (and afterwards Mr. Gauss), and in connection with their testimony translations of all this manuscript, of various articles in the papers, and of Most's Science of Revolutionary War, so seized as aforesaid, were offered and received over the objection and exception of the defendants. The objection was frequently interposed, but its first general expression is found on page 502 of vol. I, as follows:

"Mr. SALOMON: We wish to interpose an objection here to all these articles and translations now sought to be introduced.

"Objection overruled; exception by defendants."

Subsequently (p. 505), motion was made to exclude said translations, &c., which motion was overruled, and exception taken by defendants. *Like* motions were made as to all this captured matter when introduced, and exception taken to the action of the court denying said motions.

With reference to the introduction of the letter and postal card from Most to Spies we call attention to the following matter omitted by inadvertence in the hurry of preparation from our former printed matter submitted to the court:

An inspection of the entire record shows, and this will not be contradicted, that the only letter and postal introduced in evidence on the trial are the letter and postal from Most to Spies obtained by officers Jones and Flynn from Spies' desk by the breaking open of the doors of the *Arbeiter Zeitung* building and the forcing of the desk in question, under the personal supervision of State's Attorney Grinnell, without any kind of warrant or authority, as shown by the testimony of Flynn, Jones, and Furthman heretofore cited. Said letter and postal were not identified until the State made Mr. Spies their witness for that purpose, and Mr. Spies was compelled by the court to submit to the State's examination, as heretofore shown by the citation from Spies' examination. The letter and postal having been thus identified by Spies under compulsion and exception, the record shows immediately on the close of the State's examination of Spies the following (vol. N, p. 102):

"Mr. INGHAM (*of counsel for the State*): We offer the letter in evidence, the letter referred to as Most's letter."

This was objected to by defendant, and, after argument, the record shows the following (vol. N, pp. 104, 105):

"The COURT: There isn't any doubt about it. Letters addressed to a person and received by him and not destroyed are admissible, if they relate to the subject-matter that is under investigation. * * * Read your translation.

"Defendants' counsel then and there excepted to the ruling of the court."

Thereupon the State called Mr. Gauss, the translator, and the record shows the following as to his examination and the letter and postal from Most referred to (vol. N., pp. 105–107):

"E. L. C. GAUSS, recalled by the People, was examined by Mr. INGHAM, and testified as follows:

"Q. Have you translated that letter?

"A. I did.

"Q. Is that translation correct?

"A. It is.

"The COURT: You agree, from the contents, that it is 1884?

"Mr. BLACK: It is agreed it is 1884; it must have been.

"The COURT: Make it 1884.

"The WITNESS: I took it for "5" originally, and showed it to a gentleman in the office, and he thought it was 5 also.

"The COURT: The parties agree from the contents it must have been 4.

Mr. GAUSS read in evidence the translation of the letter in the words and figures following, to wit:

"DEAR SPIES: Are you sure that the letter from the Hocking Valley was not written by a detective? In a week I will go to Pittsburgh, and I have an inclination to go also to the Hocking Valley. For the present I send you some printed matter. There the 'Sch.' and 'H.' also existed, but on paper. I told you this some months ago. On the other

hand, I am in a condition to furnish medicine, and the 'genuine' article at that. Directions for use are perhaps not needed with these people. Moreover, they were recently published in the 'Fr.' The appliances I can also send. Now, if you consider the address of Buchtell thoroughly reliable I will ship twenty or twenty-five pounds. But how? Is there an express line to the place, or is there another way possible? Paulus the Great seems to delight in hopping around in the swamps of the N. Y. V. Z. like a blown up (bloated) frog. His tirades excite general detestation. He has made himself immensely ridiculous. The main thing is only that the fellow cannot smuggle any more rotten elements into the newspaper company than there are already in it. In this regard the caution is important to be on the minute. The organization here is no better nor worse than formerly. Our group has about the strength of the North Side group in Chicago, and then, besides this, we have also the Soc. Rev. 6, 1, the Austrian League, and the Bohemian League, so to say, three more groups. Finally, it is easily seen that our influence with the trade organizations is steadily growing. We insert our meetings in the Fr. and cannot notice that they are worse attended than at the time when we get through weekly $1.50 and $2.00 into the mouth of the N. Y. M. V. Z.

"Don't forget to put yourself into communication with Drury in reference to the English organ. He will surely work with you much and well. Such a paper is more necessary as to truth. This, indeed, is getting more miserable and confused from issue to issue, and in general is whistling from the last hole. Enclosed is a fly-leaf which recently appeared at Emden., and is perhaps adapted for reprint. Greeting to Schwab, Rau, and to you. Your Johann Most. P. S.—To Buchtell I will of course write for the present only in general terms."

"A. Spies, No. 107 Fifth avenue, Chicago, Illinois."

Mr. INGHAM: Did you translate the postal card?

A. I did translate this postal card.

Q. Is it correct?

A. It is.

Defendants' counsel objected to its introduction in evidence on the grounds already stated. The court overruled the objection, to which ruling of the court counsel for defendants then and there excepted.

The WITNESS (reads): The address is "Dear Spies, 107 Fifth avenue, Chicago, Illinois."

Mr. ZEISLER: You have no right to interpret. It is addressed "L. S."

The WITNESS: L. S.; that is what it stands for.

The COURT: If there is any usage in the German language as to the letter L. you may state that usage.

The WITNESS: There is this usage, that the letter L. and the first letter of the name always stand for lieber so-and-so—Lieber Spies in this connection. (Reads:) "I had scarcely mailed my letter yesterday when the telegraph brought news from H. T. H. One does not know whether to rejoice over that or not. The advance is in itself elevating. Sad is the circumstances that it will remain local, and, therefore, might not have a result. At any rate, these people make a better impression than the foolish voters on this and the other side of the ocean. Greetings and a shake. Yours, J. M.

"Drury, I suppose (hope), can now and then receive upon tickets."

II.

With reference to the matter of the jury we desire to submit the following additional suggestions and matter shown by the record:

The statute of Illinois provides for the swearing of the jury to try the cause in panels of four. The last panel of four, as shown by the record, was never accepted by defend-

ants. After their peremptory challenges were exhausted and their challenge for cause against Sanford had been overruled, and their exceptions preserved, the record shows that defendants declined to take any further action (H, 307). The panel of four was then sworn without their assent and sat on the trial of the cause.

If it should be suggested that after the examination of Mr. Adams, the eleventh man examined, who sat as a juror, defendants still had a number of peremptory challenges with which they could have then excluded Greiner, Reed, and Adams from the panel, and that these challenges were improvidently used in excluding from the jury unobjectionable men, the reply is two fold:

(1.) The record shows that Mr. Adams was tendered to the defendants by the State with Mr. Greiner, Mr. Reed, and Mr. Quinlan (H, 35). Mr. Quinlan was, upon examination by the defendants, challenged for cause, and the challenge sustained.

Thereupon defendants were required to fill the panel of four, and did so by Mr. Cassady (H, 56), who was challenged by the State for cause. The State then, after examining B. H. Patterson, who admitted he had an opinion as to the guilt or innocence of the defendants, tendered to the defendants Greiner, Reed, Adams, and Patterson (H, 63).

Patterson was then challenged peremptorily by defendants.

Thereafter defendants examined 98 panelmen, of whom 56 were excused for cause (vol. H, pp. 65, 67, 71, 73, 75, 77, 79, 81, 83, 87, 89, 95, 101, 106, 108, 117, 119, 121, 122, 124, 126, 132, 134, 141, 143, 145, 147, 151, 154, 156, 173, 175, 177, 179, 194, 198, 202, 208, 211, 214, 216, 228, 234, 236, 240, 244, 245, 247, 251, 253, 267, 274, 279, 284, 288, & 292), and 42 were challenged peremptorily.

But of those thus peremptorily challenged the record (vol. H) shows that the examinations developed, as to their attitude and state of mind, the following facts—twenty of them—to wit:

Porter (p. 69), Rowe (p. 84), Roberts (p. 93), Myers (p. 96), Carr (p. 98), Koontz (p. 110), Cavanaugh (p. 112), Nelson (p. 115), Conkling (p. 183), Atwater (p. 191), Levi (p. 218), Roberts (p. 223), Enright (p. 226), Hartney (p. 230), Beveridge (p. 232), Hugenon (p. 242), Kueken (p. 255), Madden (p. 257), Wineberger (p. 259), & Ruck (p. 262) had formed and expressed an opinion, still entertained, touching the guilt or innocence of the defendants, some of them saying the opinion was strong and firm, and some saying they had a firm or even enthusiastic prejudice against or decided opposition to socialists, communists, and anarchists. Of these Porter, Rowe, Roberts, Carr, Koontz, Nelson, and Conkling were first challenged on their answers for cause, challenge overruled, and then challenged peremptorily.

Of the 22 others, Beedle (p. 103), Nicholas (p. 104), Hall (p. 128), Ellsworth (p. 130), Graves (p. 149), Aldrich (p. 181), Phelps (p. 188), McKenzie (p. 195), Kane (p. 201), West (p. 269), Beers (p. 286), and Wait, late chief deputy sheriff of Cook county, (p. 297) were opposed to socialists, anarchists, and communists, and many of them to all organizations and organizers of labor, while McElwain (p. 193) admitted a present prejudice against the defendants; Sullivan (p. 273) and Bennett (p. 281) had an opinion as to defendants' guilt and a strong prejudice against socialists, communists, and anarchists; Haaker (p. 265) had an opinion touching the defendants' guilt or innocence; while Brown (p. 140) was objected

to as not a citizen, the challenge for cause was overruled, and he was then challenged peremptorily. This leaves only Wynne (p. 88), Walcott (p. 113), Metcalf (p. 186), Fay (p. 271), & Bowman (p. 277) against whom the peremptory challenge was used without cause apparent on the record. Of those in this 22, besides Brown, the following were first challenged for cause on their answers, challenge overruled, and then challenged peremptorily, to wit, Beedle, Nicholas, Hall, Ellsworth, and Graves.

(2.) But our second reply is, that the peremptory challenge is an unrestrained personal privilege of the defendants, which may be exercised by them arbitrarily and without inquest as to their motives or the considerations possibly influencing their action. It is sufficient to support their contention herein, that defendants were compelled to submit to a trial by a partial jury, when the record shows that the statute, as interpreted by the State court, provides for such a jury; that defendants' peremptory challenges were, in fact, exhausted, and that, in fact, partial jurors were upon the panel against defendants' objection and right.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

IN THE MATTER OF THE PETITION

—OF—

AUGUST SPIES, ET ALS.,

FOR A WRIT OF ERROR TO THE SUPREME COURT OF ILLINOIS.

III.

The record shows (vol. I, page 4) that the indictment on which defendants were tried was as follows, to wit:

"STATE OF ILLINOIS, } ss:
Cook County, }

"Of the May term of the criminal court of Cook county, in said county and State, in the year of our Lord one thousand eight hundred and eighty-six.

"The grand jurors chosen, selected and sworn, in and for

the county of Cook, in the State of Illinois, in the name and by the authority of the people of the State of Illinois, upon their oaths present that one August Spies, one Michael Schwab, one Samuel Fielden, one Albert R. Parsons, one Adolph Fischer, one George Engel, one Louis Lingg, one William Seliger, one Rudolph Schnaubelt, and one Oscar W. Neebe, each late of the county of Cook, on the fourth day of May, in the year of our Lord one thousand eight hundred and eighty-six, in said county of Cook, in the State of Illinois aforesaid, in and upon the body of one Matthias J. Degan, in the peace of the said people of the State of Illinois then and there being, unlawfully, willfully, feloniously, and of their malice aforethought, did make an assault, and that they, the said August Spies, the said Michael Schwab, the said Samuel Fielden, the said Albert R. Parsons, the said Adolph Fischer, the said George Engel, the said Louis Lingg, the said William Seliger, the said Rudolph Schnaubelt, and the said Oscar W. Neebe, with a certain deadly and destructive instrument then and there charged with divers dangerous and explosive substances, a more particular description of which is to the said jurors unknown, unlawfully, willfully, feloniously, and of their malice aforethought, did ignite and cast upon the ground near to the said Matthias J. Degan, then and there causing the said instrument to explode and fragments thereof to strike, lacerate, penetrate, and wound the body and limbs of the said Matthias J. Degan, then and there giving to him, the said Matthias J. Degan, with the fragments aforesaid in and upon divers parts of the head, left thigh, limbs and body of him, the said Matthias J. Degan, divers mortal wounds, bruises, lacerations, and contusions, of which said mortal wounds, bruises, lacerations, and contusions he, the said Matthias J. Degan, from the said fourth day of May, in the year aforesaid, until afterwards, to wit, on the same fourth day of May, in the same year, languished and languishing did live, on which said fourth day of May, in

the same year, in the county and State aforesaid, he, the said Matthias J. Degan, of the said mortal wounds, contusions, and lacerations died, and so the jurors aforesaid, upon their oaths aforesaid, do say that the said August Spies, the said Michael Schwab, the said Samuel Fielden, the said Albert R. Parsons, the said Adolph Fischer, the said George Engel, the said Louis Lingg, the said William Seliger, the said Rudolph Schnaubelt, and the said Oscar W. Neebe, him, the said Matthias J. Degan, in manner and form aforesaid, unlawfully, willfully, feloniously, and of their malice aforethought, did kill and murder, contrary to the statute, and against the peace and dignity of the same people of the State of Illinois.

"The grand jurors aforesaid, chosen, selected, and sworn, in and for the county of Cook, in the State of Illinois, in the name and by the authority of the people of the State of Illinois, upon their oaths aforesaid, do further present that one August Spies, one Michael Schwab, one Samuel Fielden, one Albert R. Parsons, one Adolph Fischer, one George Engel, one Louis Lingg, one William Seliger, one Rudolph Schnaubelt, and one Oscar W. Neebe, each late of the county of Cook, on the fourth day of May, in the year of our Lord one thousand eight hundred and eighty-six, in said county of Cook, in the State of Illinois aforesaid, in and upon the body of one Matthias J. Degan, in the peace of the said people of the State of Illinois then and there being, unlawfully, willfully, feloniously, and of their malice aforethought, did make an assault, and that they, the said August Spies, the said Michael Schwab, the said Samuel Fielden, the said Albert R. Parsons, the said Adolph Fischer, the said George Engel, the said Louis Lingg, the said William Seliger, the said Rudolph Schnaubelt, and the said Oscar W. Neebe, with a certain pistol, commonly called revolver, then and there charged with gunpowder and divers leaden bullets, which said pistol they, the said August Spies, the said Michael Schwab, the said Samuel Fielden, the said Albert R. Parsons, the said Adolph Fischer, the

said George Engel, the said Louis Lingg, the said William Seliger, the said Rudolph Schnaubelt, and the said Oscar W. Neebe, then and there, in their several and respective right hands, had and held him, the said Matthias J. Degan, in and upon the left thigh of him, the said Matthias J. Degan, then and there, unlawfully, willfully, feloniously, and of their malice aforethought, did discharge and shoot off to, against, towards, and upon the said Matthias J. Degan, and that the said August Spies, the said Michael Schwab, the said Samuel Fielden, the said Albert R. Parsons, the said Adolph Fischer, the said George Engel, the said Louis Lingg, the said William Seliger, the said Rudolph Schnaubelt, and the said Oscar W. Neebe, with one of the leaden bullets aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said August Spies, the said Michael Schwab, the said Samuel Fielden, the said Albert R. Parsons, the said Adolph Fischer, the said George Engel, the said Louis Lingg, the said William Seliger, the said Rudolph Schnaubelt, and the said Oscar W. Neebe discharged and shot off as aforesaid, then and there, unlawfully, willfully, feloniously, and of their malice aforethought, did strike, penetrate, and wound him, the said Matthias J. Degan, in and upon the left thigh of him, the said Matthias J. Degan, giving to him, the said Matthias J. Degan, then and there, with the leaden buliet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said August Spies, the said Michael Schwab, the said Samuel Fielden, the said Albert R. Parsons, the said Adolph Fischer, the said George Engel, the said Louis Lingg, the said William Seliger, the said Rudolph Schnaubelt, and the said Oscar W. Neebe, in and upon the left thigh of him, the said Matthias J. Degan, one mortal wound, contusion, and laceration, of the depth of four inches and of the breadth of one inch, of which said mortal wound, contusion, and laceration he, the said Matthias J. Degan, from the said fourth day of May, in the year aforesaid, until

afterwards, to wit, on the same fourth day of May, in the same year, languished and languishing did live, on which said fourth day of May, in the same year, in the county and State aforesaid, he, the said Matthias J. Degan, of the said mortal wound, contusion, and laceration died, and so the jurors aforesaid, upon their oaths aforesaid, do say that the said August Spies, the said Michael Schwab, the said Samuel Fielden, the said Albert R. Parsons, the said Adolph Fischer, the said George Engel, the said Louis Lingg, the said William Seliger, the said Rudolph Schnaubelt, and the said Oscar W. Neebe, him, the said Matthias J. Degan, in manner and form aforesaid, unlawfully, willfully, feloniously, and of their malice aforethought, did kill and murder, contrary to the statute and against the peace and dignity of the same people of the State of Illinois.

"The grand jurors aforesaid, chosen, selected, and sworn in and for the county of Cook, in the State of Illinois, in the name and by the authority of the people of the State of Illinois, upon their oaths aforesaid, do further present that one August Spies, one Michael Schwab, one Samuel Fielden, one Albert R. Parsons, one Adolph Fischer, one George Engel, one Louis Lingg, one William Seliger, one Rudolph Schnaubelt, and one Oscar W. Neebe, each late of the county of Cook, on the fourth day of May, in the year of our Lord one thousand eight hundred and eighty-six, in said county of Cook, in the State of Illinois aforesaid, in and upon the body of one Matthias J. Degan, in the peace of the said people of the State of Illinois then and there being, unlawfully, wilfully, feloniously, and of their malice aforethought, did make an assault, and that they, the said August Spies, the said Michael Schwab, the said Samuel Fielden, the said Albert R. Parsons, the said Adolph Fischer, the said George Engel, the said Louis Lingg the said William Seliger, the said Rudolph Schnaubelt, and the said Oscar W. Neebe, with certain means, instruments and weapons, a more particular description of which is to'

the said jurors unknown, unlawfully, willfully, feloniously, and of their malice aforethought, did strike, lacerate, penetrate, and wound the body and limbs of the said Matthias J. Degan, then and there giving to him, the said Matthias J. Degan, with the means, instruments, and weapons aforesaid, in and upon divers parts of the head, left thigh, limbs, and body of him, the said Matthias J. Degan, divers mortal wounds, bruises, lacerations, and contusions, of which said mortal wounds, bruises, lacerations, and contusions he, the said Matthias J. Degan, from the said fourth day of May, in the year aforesaid, until afterwards, to wit, on the same fourth day of May, in the same year, languished and languishing did live, on which said fourth day of May, in the same year, in the county and State aforesaid, he, the said Matthias J. Degan, of the said mortal wounds, contusions, and lacerations died, and so the jurors aforesaid, upon their oaths aforesaid, do say that the said August Spies, the said Michael Schwab, the said Samuel Fielden, the said Albert R. Parsons, the said Adolph Fischer, the said George Engel, the said Louis Lingg, the said William Seliger, the said Rudolph Schnaubelt, and the said Oscar W. Neebe, him, the said Matthias J. Degan, in manner and form aforesaid, unlawfully, willfully, feloniously, and of their malice aforethought, did kill and murder, contrary to the statute, and against the peace and dignity of the same People of the State of Illinois.

"The grand jurors aforesaid, chosen, selected, and sworn, in and for the county of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid, do further present that a certain person, a further description of whom is to the said jurors unknown, late of the county of Cook, on the fourth day of May, in the year of our Lord one thousand eight hundred and eighty-six, in said county of Cook, in the State of Illinois aforesaid, in and upon the body of one Matthias J. Degan, in the peace

of the said People of the State of Illinois then and there being, unlawfully, willfully, feloniously, and of his malice aforethought, did make an assault, and that he, the said person, a further description of whom is to the said jurors, unknown, with a certain deadly and destructive instrument then and there charged with divers dangerous and explosive substances, a more particular description of which is to the said jurors unknown, unlawfully, willfully, feloniously, and of his malice aforethought, did ignite and cast upon the ground near to the said Matthias J. Degan, then and there causing the said instrument to explode and fragments thereof to strike, lacerate, penetrate, and wound the body and limbs of the said Matthias J. Degan, then and there giving to him, the said Matthias J. Degan, with the fragments aforesaid, in and upon divers parts of the head, left thigh, limbs, and body of him, the said Matthias J. Degan, divers mortal wounds, bruises, lacerations, and contusions, of which said mortal wounds, bruises, lacerations, and contusions he, the said Matthias J. Degan, from the said fourth day of May, in the year aforesaid, until afterwards, to wit, on the same fourth day of May, in the same year, languished and languishing, did live, on which said fourth day of May, in the same year, in the county and State aforesaid, he, the said Matthias J. Degan, of the said mortal wounds, contusions, and lacerations, died; and that one August Spies, one Michael Schwab, one Samuel Fielden, one Albert R. Parsons, one Adolph Fischer, one George Engel, one Louis Lingg, one William Seliger, one Rudolph Schnaubelt, and one Oscar W. Neebe, each late of the county of Cook, then and there unlawfully, willfully, feloniously, and of their malice aforethought, did stand by and aid, abet, and assist the said person, a further description of whom is to the said jurors unknown, in the perpetration of the crime aforesaid, and so the jurors aforesaid, upon their oaths aforesaid, do say that the said person, a further description of whom is to the said jurors

unknown, the said August Spies, the said Michael Schwab, the said Samuel Fielden, the said Albert R. Parsons the said Adolph Fischer, the said George Engel, the said Louis Lingg, the said William Seliger, the said Rudolph Schnaubelt, and the said Oscar W. Neebe, him, the said Matthias J. Degan, in manner and form aforesaid unlawfully, willfully, feloniously, and of their malice aforethought, did kill and murder, contrary to the statute and against the peace and dignity of the same people of the State of Illinois."

The other counts in the indictment, being sixty-five in number, set forth substantially the same allegations contained in the foregoing counts set out in full, varying only in this, that in these respective counts defendants were alleged to be accessories at or before the time to the commission of the offense, by an unknown person, with either a bomb, a revolver, or an unknown weapon, and in others that they were parties to the commission of the crime by each of the ten named in the indictment, respectively, the other nine being accessories at or before the commission of the crime. (See Record, volume 1, pages 5 to 19, inclusive.)

Record also shows, vol. 1, page 117, a motion to quash the indictment upon the following among other grounds:

1.

There is a misjoinder of counts in the indictment.

2.

There is a multiplicity of counts in the indictment.

3.

The indictment is uncertain and insufficient.

Which motion was by the court overruled (p. 122); to the overruling of which motion the said defendants then and there severally and respectively excepted.

The record further shows (vol. 1, page 104) that the motion for new trial was overruled; to which defendants excepted; and further shows:

"And the said defendants, by their counsel, now here move the court in arrest of judgment in this cause, and the court hearing counsel in support of said motion, as well as in opposition thereto, and being now fully advised in the premises, doth overrule said motion, and orders that said motion in arrest of judgment in this cause be, and the same is hereby, overruled accordingly; to which order of the court in overruling said motion the said defendants, by their counsel, now here except."

The record further shows (vol. O, page 155) that in the supreme court of the State, among other assignments of errors, were the following:

1.

The court erred in refusing to quash the indictment.

XXVI.

The court erred in overruling the defendant's motion in arrest of judgment.

XXVII.

The court erred in giving judgment on the verdict.

The record in this case shows, further, (Vol. N., p. 86,) that upon the State's examination of August Spies the following question was asked:

"Q. Were you in the habit of making speeches at the meetings of the American group."

This was objected to as not proper cross-examination.

The objection was fully discussed (Vol. N., pages 86 to 89,) at the close of which discussion the following occurred (pp. 89–90):

"Mr. INGHAM [*Of Counsel for State*]: One of the charges in this case is that this defendant was a party to a conspiracy."

"Mr. FOSTER: You don't charge that.

"Mr. INGHAM: We charge he was a party to a conspiracy which ended in murder.

"Mr. BLACK: There is no charge of that character in this indictment.

"The COURT: I think you can go into what he has done.

"Defendants' counsel then and there excepted to the ruling of the court."

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

AUGUST SPIES, ET AL.,

vs.

PEOPLE OF THE STATE OF ILLINOIS.

PETITION FOR WRIT OF ERROR.

COPY OF RECORD IN SAID CAUSE SHOWING IN FULL THE EXAMINATIONS OF JURORS THEODORE DENKER AND H. T. SANFORD.

To which is appended an extract from the ~~proceedings~~ in the Supreme Court of the State of Illinois, relating to th ejury which tried said cause, together with the assignment of errors in said court.

THURSDAY, *June* 24, 1886.

Record, vol. B, page 112.

Examination of THEODORE DENKER, a juror in said cause, is as follows:

For defence:

Mr. FOSTER: What is your name?
A. Theodore Denker.

Q. Where do you live?
A. Woodlawn Park, in the town of Hyde Park.
Q. How far south from the court-house across the river?
A. Seven miles.
Q. Did you live there on the 4th of May last?
A. Yes.
Q. You heard of this Haymarket meeting, I suppose?
A. Yes.
Q. Have you formed an opinion upon the question of the defendant's guilt or innocence upon the charge of murder, or any of them?
A. I have.
Q. Have you expressed that opinion?
A. Yes.
Q. You still entertain it?
A. Yes.
Q. You believe what you read and what you heard?
A. I believe it; yes.
Q. Is that opinion such as to prevent you from rendering an impartial verdict in the case sitting as a juror under the testimony and the law?
A. I think it is.

Challenged for cause.

Mr. GRINNELL: If you were taken and sworn as a juror in the case, can't you determine the innocence or the guilt of the defendants upon the proof that is presented to you here in court, regardless of your having any prejudice or opinion?
A. I think I could.
Q. You could determine their guilt or innocence upon the proof presented to you here in court, regardless of your prejudice and regardless of your opinion, and regardless of what you have read?
A. Yes.

The COURT: Do you fairly and impartially try the case and render an impartial verdict upon the evidence as it may be presented here and the instructions of the court?
A. Yes; I think I could.

(Challenge for cause overruled, and exception.)

Mr. FOSTER: I was going to ask you something about the opinion that you have formed from reading the papers and

from conversation. I believe you answered me before that you had formed an opinion from reading and hearing conversation. That is correct, is it?

A. Yes; but I don't believe everything I read in the newspapers.

Q. No; but you believe enough to form an opinion?

A. Yes; I formed an opinion.

Q. Was that opinion principally from what you read in the papers or was it from what you heard on the street?

A. From what I read entirely.

Q. Then you did believe enough of what you read to form an opinion upon the question of the guilt or innocence of these men or some of them?

A. Yes.

Q. And I believe you said you also expressed your opinion which you have formed to others with whom you conversed?

A. Yes; I have expressed that opinion.

Q. During the expression of this opinion I will ask you whether you stated in substance to these persons or any of them that you believed enough of what you had read to form the opinion which you had?

The COURT: Did you in any conversation that you had say anything as to what you believed or not the account which was in the newspapers which you read?

A. No, sir; I never expressed an opinion in regard to whether the newspapers were correct or not.

Q. You never discussed that matter at all?

A. No, sir.

Mr. FOSTER: What did you say your business was?

A. I am a shipping clerk for Henry W. King & Co., wholesale clothiers, 222 Madison street, corner of Franklin street.

Q. How long have you been engaged in that business?

A. About two years and three montbs.

Q. What is your age?

A. Twenty-seven.

Q. What other business have you followed?

A. Previous to going there I worked in the United States Express Company.

Q. In what capacity?

A. As conductor on a wagon.
Q. What is your age?
A. 27.
Q. How long have you lived in Chicago?
A. Twenty-five years.
Q. Are you acquainted with any members of the police force of the city of Chicago that were present at the Haymarket meeting on the occasion referred to?
A. No, sir.
Q. Have you ever had any conversation with any one that undertook to detail the facts as they occurred at the Haymarket Square, or who claimed they had been there?
A. No, sir.
Q. Is your opinion entirely made up of what you have read distinguished from what you have heard?
A. Entirely from what I have read in the newspapors.
Q. Have you had much conversation with others in regard to it at or about your place of business or elsewhere?
A. We have conversed about it a number of times there iu the house.
Q. There is where you have expressed, I presume, the opinion which you have formed?
A. Yes, sir;
Q. Are you acquainted with any of the attorneys for the prosecution?
A. I am acquainted with Mr. Walker.
Q. Did you ever go to school with him?
A. No, sir.
Q. Did you have business relations with him, or social?
A. Social relations only.
Q. Did you ever live near him?
A. We both lived on the north side when we were boys going to school. I never went to the same school with him.
Q. Did you play together on the streets?
A. I don't think we ever did.
Q. You never had a fight, did you?
A. Not that I know of.
Q. How long has it been since you had this intimate acquaintance with Mr. Walker?
A. I met Mr. Walker up to my brother-in-law's house, I think, last New Year's day.
Q. The relation has only been casual, as I understand it?
A. Yes.

Q, You don't visit at his house?
A. No, sir.
Q. Nor he at yours?
A. No, sir.
Q. Are you a married man?
A. No, sir.
Q. Do you live with your parents?
A. Yes, sir.
Q. Do you know anything about socialism, anarchism, or communism?
A. No, sir; I do not.
Q. Have you any prejudice against this class of persons?
A. I think I am a little prejudiced against socialism. I don't know that I am against anarchism. In fact, I don't really understand what they are. I do not know what their principles are at all.
Q. I understand you to say that notwithstanding the opinion you formed at the time you read the newspaper that you now are conscious of the fact that you can try this case and settle it upon the testimony introduced here?
A. Yes; I think I could.
Q. And not be controlled or governed by any impression that you might have had heretofore?
A. Yes, sir.
Q. And the law as given you by the court governing it?
A. Yes, sir.
Q. In the conversations that you have had there at the store you say you have expressed the opinion which you have formed before?
A. Yes, sir.
Q. Is that of frequent occurrence—that you have expressed the opinion you have formed?
A. Well, I think I have expressed it pretty freely.
Q. As to the number of times—as to whether it was frequent or not?
A. O, no; we did not bring the matter up in conversation very often, but when we did we generally expressed our opinions in regard to the matter.
Q. Your mind was made up from what you read, and you had no hesitancy in saying it—speaking it out.
A. I don't think I hesitated.
Q. Would you feel yourself any way governed or bound in

listening to the testimony and determining it upon the prejudgment of the case you had expressed to others before.

A. Well, that is a pretty hard question to answer.

Q. I will ask you whether acting as a juror here you would feel in any way bound or governed by the judgment that you had expressed on the same question to others before you were taken as a juryman; do you understand that?

A. I don't think I would.

Q. That is, you have now made up your mind, or at least you have formed an opinion; you have expressed that freely to others. Now, the question is whether when you listen to the testimony you will have in your mind the expression which you have given to others and have to guard against that and be controlled by it any way.

A. No, sir; I don't think I would. I think I could try the case from the testimony regardless of this.

Q. Then you could go back to those fellows and say that the testimony was not what you supposed?

(Objected to.) Objection sustained.

Q. I understand you to say that you believe that you can entirely lay to one side the opinion which you have formed; it would require no circumstances or evidence to overcome it if you were accepted as a juryman?

A. I think I could lay aside that opinion I have formed.

Q. You believe that you could?

A. Yes.

Q. Is that your honest judgment?

A. Yes.

Q. Have you any church affiliations?

A. No, sir.

Q. Are you a member of no church?

A. No, sir.

Q. Are your parents Protestant in faith?

A. Yes.

(Four jurors tendered to State.)

Examination of THEODORE DENKER by Mr. GRINNELL, for the State:

Q. Where were you born?

A. In Minnesota.

Q. Are your people living out at Woodlawn?

A. Yes; my mother is.
Q. How long have you lived in this county?
A. In Cook county twenty-five years.
Q. You are twenty-seven years old?
A. Yes, sir.
Q. Do you know any of the defendants?
A. No, sir.
Q. Did you ever see them before?
A. No, sir.
Q. You are shipping clerk at Henry W. King & Co.'s?
A. Yes, sir.
Q. What position?
A. Shipping clerk.
Q. Who is the head shipping clerk?
A. I am the only shipping clerk.
Q. Do you know anything of the counsel upon the other side?
A. No, sir.
Q. You have men under you assisting you in shipping?
A. No; there are no men under me.
Q. Do you belong to any labor organization?
A. No, sir.
Q. You stated, I believe, that you didn't know much about anarchism or communism, and therefore you couldn't tell whether you had a prejudice or not.
A. No, sir; I do not.
Q. But you have read something about socialism?
A. Yes, sir.
Q. Do you believe in the maintenance of the laws of the State of Illinois and the Government of the United States?
A. Yes, sir; I do.
Q. Have you any sympathy with any individual or class of individuals who have for their purpose or object the overthrow of the law by force?
A. No, sir.
Q. Have you any conscientious scruples against the infliction of the death penalty in proper cases?
A. No, sir.
Q. If taken as a juror in this case do you believe you could determine the innocence or guilt of the defendants upon the proof presented to you here in court, under the instructions of the court regardless of everything else?
A. Yes; I think I could.

Q. You know now of no prejudices or bias that would interfere with your duties as a juror?
A. No, sir.
Q. Are you a socialist, a communist, or an anarchist?
A. No, sir.
Q. You have no associations or affiliations with that class of people, so far as you know?
A. No, sir.

* * * * * * *

Record, Vol. B, p. 286.

"FRIDAY AFTERNOON, *June* 25, 1886.

"Four jurors having been accepted both by the people and the defense the said jurors were duly sworn to try the issues in said cause."

[NOTE.—The above refers to the first four and included Juror Denker.]

Vol. H, p. 298.

THURSDAY MORNING, July 15, 1886.

The following is examination of H. T. Sanford as it appears in the record:

H. T. SANFORD, having been duly sworn to answer questions touching his qualification as a juror, deposed and testified as follows:

(By the defense):

Mr. FOSTER: What is your name?
A. H. T. Sanford.
Q. Where do you reside, Mr. Sanford?
A. Oak Park.
Q. Where is Oak Park?
A. About eight miles out on the Northwestern.
Q. What is your business?
A. I am a clerk in the Northwestern road.
Q. In what capacity?
A. I am in the freight auditor's office.
Q. How long have you been engaged in that business?
A. About fifteen months.
Q. What is your age?

A. Twenty-four.

Q. What other business have you had?

A. I was a petroleum broker before I came to Chicago, in New York.

Q. You have resided in Chicago only about eighteen months?

A. That is all.

Q. I don't know that I understand what you mean by petroleum broker. Do you mean you actually handled the material or that you speculated in stocks?

A. Well, there is a difference between stocks and petroleum, you know. I did not actually handle the oil, but I was a member of the petroleum exchange of New York.

Q. Isn't that a little like a grain exchange, in which you buy and sell on commission?

A. Yes; very much the same.

Q. Only instead of being grain it is petroleum?

A. I think so.

Q. How long were you engaged in that business in New York?

A. About fifteen months.

Q. Have you any conscientious scruples against the infliction of the death penalty in proper cases?

A. No.

Q. Were you born in New York?

A. Yes.

Q. Your parents reside in Chicago now?

A. No, sir.

Q. Are you a married man?

A. I am.

Q. Have you any church affiliations?

A. None.

Q. Not a member of any church?

A. No, sir.

Q. You know what case is on trial now, I presume?

A. Yes.

Q. Have you any opinion as to the guilt or the innocence of the defendants or any of them of the murder Matthias J. Degan?

A. I have.

Q. You have an opinion; you say you have formed an opinion somewhat upon the question of the guilt or innocence of these defendants, do you mean, or that there was

an offense committed at the haymarket by the throwing of the bomb?

A. Well, I would rather have you ask them, one at a time.

Q. All right. Have you an opinion as to whether or not there was an offense committed at the haymarket meeting by the throwing of the bomb?

A. Yes.

Q. Now, from all that you have read and all that you have heard have you an opinion as to the guilt or innocence of any of the eight defendants of the throwing of that bomb?

A. Yes.

Q. You have an opinion upon that question also?

A. I have.

Q. Did you ever sit on a jury?

A. Never.

Q. I suppose you know something about the duties of a juror?

A. I presume so.

Q. You understand, of course, that when a man is on trial, whether it be for his life or for any penal offense, that he can only be convicted upon testimony which is introduced in the presence and the hearing of the jury? You know that, don't you?

A. Yes.

Q. You know that any newspaper gossip or any street gossip has nothing to do with the matter whatever, and that the jury are to consider only the testimony which is admitted by the court actually, and then are to consider that testimony under the direction, as contained in the charge, of the court; you understand that?

A. Yes.

Q. Now, if you should be selected as a juror in this case to try and determine it, do you believe that you could exercise legally the duties of a juror—that you could listen to the testimony and all of the testimony and the charge of the court, and after deliberation return a verdict which would be right and fair as between the defendants and the people of the State of Illinois?

A. Yes, sir.

Q. You believe that you could do that?

A. Yes, sir.

Q. You could fairly and impartially listen to the testimony that is introduced here?

A. Yes.

Q. And the charge of the court and render an impartial verdict, you believe?

A. Yes.

Q. Have you any knowledge of the principles contended for by socialists, communists, and anarchists?

A. Nothing, except what I read in the papers.

Q. Just general reading?

A. Yes.

Q. You are not a socialist, I presume, or a communist?

A. No, sir.

Q. Have you a prejudice against them for what you have read in the papers?

A. Decided.

Q. A decided prejudice against them? Do you believe that that would influence your verdict in this case or would you try the real issue which is here, as to whether these defendants were guilty of the murder of Mr. Degan or not, or would you try the question of socialism or anarchism, which really has nothing to do with the case?

A. Well, as I know so little about it in reality at present, it is a pretty hard question to answer.

Q. You would undertake—you would attempt, of course, to try the case upon the evidence introduced here—upon the issue which is presented here?

A. Yes, sir.

Q. Now, that issue and the only issue which will be presented to this jury, unless it is presented with some other motive than to arrive at the truth, I think is, did these men throw the bomb which killed officer Degan? If not, did they aid, abet, encourage, assist, or advise somebody else to do it? Now, that is all there is in this case; no question of socialism or anarchism to be determined, or as to whether it is right or wrong. Now, do you believe that you can try it upon that theory and return a verdict upon that theory and upon that issue?

A. Well, suppose I have an opinion in my own mind that they encouraged it?

Q. Keep it—That they encouraged it?

A. Yes.

Q. Well then, so far as that is concerned I do not care

very much what your opinion may be now, for your opinion now is made up of random conversations and from newspaper reading, as I understand?

A. Yes.

Q. That is nothing reliable. You do not regard that as being in the nature of sworn testimony at all, do you?

A. No.

Q. Now, when the testimony is introduced here and the witnesses are examined and cross-examined, you see them and look into their countenances, judge who are worthy of belief and who are not worthy of belief. Don't you think then you would be able to determine the question?

A. Yes.

Q. Regardless of any impression that you might have, or any opinion?

A. Yes.

Q. Have you any opposition to the organization by laboring men of associations, or societies, or unions so far as they have reference to their own advancement and protection, and are not in violation of law?

A. No, sir.

Q. Mr. Sanford, do you know any of the members of the police force of the city of Chicago?

A. Not one by name.

Q. You are not acquainted with any one that was either injured or killed, I suppose, at the Hay-market meeting.

A. No.

Q. You say your parents do not live in Illinois, never have lived here?

A. No.

Q. Is your father still living?

A. My father is dead.

Q. In what business was he engaged in New York?

A. He was a lawyer.

Q. A lawyer by profession?

A. You ought to be familiar with his name.

Mr. ZEISLER: Sanford's reports?

A. Yes.

Mr. FOSTER: Did you ever study in your father's office?

A. No, sir.

Q. Your business has been that of a petroleum broker, and your present business, and that is the only business that you have ever been engaged in since you came out of school, I presume?

A. Before that I was in a stock broker's and banker's office.

Q. As a clerk?

A. Yes, sir.

Q. Mr. Sanford, are you acquainted with any gentlemen representing the prosecution—these three gentlemen, Mr. Grinnell, Mr. Ingham, Mr. Walker, and Mr. Furthman, who not here at the present time?

A. No, sir.

Q. You are, I presume, not acquainted with any of the detective officers of the city of Chicago?

A. Not to my knowledge.

Q. Now, Mr. Sanford, if you should be selected as a juror in this case do you believe that, regardless of all prejudice or opinion which you now have, you could listen to the legitimate testimony introduced in court and upon that and that alone render and return a fair and impartial, unprejudiced and unbiased verdict?

A. Yes.

Mr. FOSTER: Upon the question on the record in this case, if your honor please, we desire to present a challenge for cause to this juror, but we do not argue it, but present it upon the ground that he has formed and expressed an opinion.

The COURT (to State's attorney): Do you want to examine him?

Mr. BLACK: We understand, Mr. Stephens (addressing clerk of the court), that your tally shows that our peremptories are exhausted?

The CLERK (Mr. Stephens): Yes, sir.

Mr. GRINNELL: Does yours show that, too?

Mr. BLACK: The same thing; yes.

Mr. INGHAM: Mr. Sanford, upon what is your opinion founded—upon newspaper reports?

A. Well, it is founded on the general theory and what I read in the newspapers.

Q. And what you read in the papers?

A. Yes, sir.

Q. Have you ever talked with any one who was present at the Haymarket at the time the bomb was thrown?

A. No, sir.

Q. Have you ever talked with any one who professed, of

his own knowledge, to know anything about the connection of the defendants with the throwing of that bomb?

A. No.

Q. Have you ever said to any one whether or not you believed the statements of facts in the newspapers to be true?

A. I have never expressed it exactly in that way, but still I have no reason to think they were false.

Q. Well, the question is not what your opinion of that was. The question simply is—it is a question made necessary by our statute, perhaps——

A. Well, I don't recall whether I have or not.

Q. So far as you know, then, you never have?

A. No, sir.

Q. Do you believe that if taken as a juror you can try this case fairly and impartially and render a verdict upon the law and the evidence?

A. Yes.

Mr. INGHAM: We submit that the cause is not well taken—the challenge.

The COURT: Well, it was not supposed to be well taken, if my former rulings have been right.

Mr. FOSTER: The challenge is overruled?

The COURT: Yes.

Mr. FOSTER: Defendants except.

Mr. GRINNELL (to witness): Sandford's Superior Court Reports?

A. Yes, sir.

Mr. BLACK: I would like to have the record, if there be no dispute about it, to show that we do not take this juror; we simply stop here.

Mr. GRINNELL: We were waiting for you to do something.

Mr. BLACK: The challenge is overruled, and we simply stop.

Mr. GRINNELL: What do you want to do with this gentleman?

Mr. BLACK: We have nothing further to do with him. We have exhausted our peremptories and our challenge for cause is not allowed, so we stop.

Mr. GRINNELL: Well, shall we proceed to ask this gentleman some questions, if the court please?

The COURT: The defendants having challenged for cause, which is overruled, can, of course, stand where they are with-

out saying anything more; but the effect of that, in my judgment, is that they accept the juror because they can't help themselves. They have got no peremptory challenge; the challenge for cause is overruled, and, necessarily, the question now is for the State to say whether they will accept this juror or not. The common law is that all jurors not challenged or to whom the challenge is not sustained are the jurors to try the case. If they are not challenged for a cause which is sustained, and if they are not challenged peremptorily, then they are necessarily the jury to try the case. Now, in this instance the defendants have no more peremptory challenges and the challenge which they have made for cause is overruled; therefore, so far as the defendants are concerned, he is a juror to try the case.

Mr. BLACK: We understand it that way.

The COURT: Whether it makes any difference that they formerly declined to do anything more about it is a question that I have not the least say about what my own opinion will be.

Mr. INGHAM: I suppose it is for them to say whether they have any more questions to ask or not.

The COURT: Well, they say they have stopped—nothing more to say, I understand them. Of course they cannot stop the trial. Of course, if they had any more questions to put to the juror that would be another thing, but they say that they have no more to say.

Mr. INGHAM: What is your first name?

A. Harry.

Mr. GRINNELL: Have you got an initial—a middle name?

A. Taylor.

Mr. INGHAM: What did you say your age is?

A. Twenty-four.

Q. You were born in New York, were you?

A. Yes, sir.

Q. New York city?

A. New York city.

Q. You live now at Oak Park?

A. Yes, sir.

Q. How long have you lived there?

A. About five months—four or five months.

Q. And where did you live before going to Oak Park?

A. I lived at 251 Ohio street.

Q. Lived there any length of time?

A. Yes; lived there almost a year; about ten months.
Q. Keeping house at Oak Park?
A. No; boarded.
Q. You boarded on Ohio street?
A. I lodged there.
Q. You say you are a married man?
A. Yes.
Q. How long have you been in the employ of the Northwestern?
A. About fifteen months.
Q. In what department?
A. Freight; auditor's office.
Q. What do you do in that office?
A. I am a voucher clerk.
Q. What was your business before that?
A. I was a petroleum broker.
Q. The only thing you have done in Chicago—the only business you have been employed at—is while being employed at the Northwestern?
A. Yes.
Q. Were you in business for yourself as a broker?
A. Yes.
Q. And had an office of your own?
A. Yes; well, I had desk-room in another office.
Q. Buying and selling on commission?
A. Yes.
Q. Or dealing on your own account?
A. On commission.
Q. How long were you in that business?
A. Well, about fifteen months; over a year, anyway; between fifteen and eighteen months, I think.
Q. That was in New York?
A. Yes.
Q. Are you a member of any church?
A. No.
Q. Brought up in any church?
A. Until the time I left home, yes.
Q. What church did you attend before that?
A. The Baptist Church.
Q. Are you now or have you ever been a member of any labor organization?
A. Well, yes and no. I belong to the Railway Clerks' Mutual Benefit Association, but that is not strictly labor.

Q. Is that sort of an insurance organization?

A. Yes. It is for assistance in case of sickness and in case of death and burial.

Q. That is the only object of the association?

A. That is all, and then to assist the members in getting employment should they be discharged.

Q. Are you a member of that association now?

A. Yes.

Q. Do you believe in the enforcement of the law?

A. Yes.

Q. Have you any sympathy with any association or class of men whose object is the overthrow of law by force or violence?

A. No, sir.

Q. Do you believe in capital punishment?

A. Yes.

Q. Do you know any one of the counsel for the defense?

A. No; not to my knowledge. I don't know who they are.

Q. Do you know any one of the defendants?

A. No.

Q. Do you know any one who is interested in them personally that you are aware of?

A. No, sir.

Q. Where were you when you were summoned—at your place of business?

A. No, sir; I was down to the contracting agent's office.

Mr. ZEISLER: Where?

A. Down to our contracting agent's office.

Mr. INGHAM: But you were about the business at the time?

A. Well, I was seeing him about some outside business; trying to place some freight.

Q. Have you ever made any study of the subject of communism?

A. No.

Q. Socialism or anarchism?

A. Never.

Q. Never read anything in regard to any of those?

A. Nothing except the newspaper reports.

Q. Have you any sympathy with the beliefs of any of those classes so far as you know?

A. None.

Q. Have you ever read law yourself any?
A. No.
Q. Where were you educated?
A. Well, I had sort of a mixed education. I wandered around considerable. I have been to quite a number of schools. I never was at college.
Q. What schools did you attend aside from the public school?
A. I was at a school in Westville, New Jersey, and one at Norwalk.
Q. I understood you to say, Mr. Sandford, that you did not know any of the defendants; never had seen any of them that you are aware?
A. Not to my knowledge.

Court then took recess until 2 p. m., and at the coming in of the court at that hour counsel for the State announced their acceptance of the last four jurors, and the same were sworn to try the case.

The following is an extract from the opinion of the supreme court of the State of Illinois relating to the jury which tried this case:

"Nine hundred and eighty-one men are called into the jury box and sworn to answer questions. Each one of the eight defendants was entitled to a peremptory challenge of twenty jurors, making the whole number of peremptory challenges allowed to the defense one hundred and sixty. The State was entitled to the same number. Seven hundred and fifty-seven were excused upon challenge for cause. One hundred and sixty were challenged peremptorily by the defense and fifty-two by the State. Of the twelve jurors who tried the case eleven were accepted by the defendants. They challenged one of these, whose name was Denker, for cause, but after the court overruled the challenge they proceeded to further question him, and finally accepted him, although 142 of their peremptory challenges were at that time unused. They accepted the 10 others, including the juror Adams, without objection. When Adams, the eleventh juror, was taken, they had 43 peremptory challenges which they had not yet used. Therefore, as to eleven of the jurymen, the defendants are estopped from complain-

ing. They virtually agreed to be tried by them because they accepted them, when, by the exercise of their unused peremptory challenges, they could have compelled every one of them to stand aside.

"Counsel for the defendants complain that the trial court overruled their challenges for cause of 26 talesmen to whose examinations they specifically call our attention. As they afterwards peremptorily challenged the talesmen so referred to, no one of them sat upon the jury. Every one of these 26 men had been peremptorily challenged before the eleventh juror was taken. After the eleventh juror was accepted the 43 peremptory challenges which then remained to the defendants were all used by them before the twelfth juror was taken.

"After the defendants had examined the twelfth juror, whose name was Sanford, they challenged him for cause. Their challenge was overruled, and they excepted. The 160 talesmen, who were peremptorily challenged by defendants, were first challenged for cause, and the challenges for cause were overruled by the trial court. It is claimed that, inasmuch as the defendants exhausted all their peremptory challenges before the panel was finally completed, the action of the court in regard to these particular jurors will be considered, and, if erroneous, such action is good ground of reversal. We think it must be made to appear that an objectionable juror was put upon the defendants after they had exhausted their peremptory challenges. 'Unless objection is shown to one or more of the jury who *tried* the case the antecedent rulings of the court upon the competency or incompetency of jurors who have been challenged and stood aside will not be inquired into in this court.'"

Holt *v.* State, 9 Tex. App., 571.

"We cannot reverse this judgment for errors committed in the lower court in overruling challenges for cause to jurors, even though defendants exhausted their peremptory challenges, unless it is further shown that an objectionable juror was forced upon them and sat upon the case after they had exhausted their peremptory challenges. This doctrine is ably discussed in Loggins *v.* State, 12 Tex. App., 65. We think the reasoning in that case is sound and answers the objection here made."

(Record, vol. O, p. 373.)

The assignment of errors made in the supreme court of the State of Illinois is as follows (vol. O, p. 155 of Record):

I.

The court erred in refusing to quash the indictment.

II.

The court erred in refusing to grant a separate trial to the defendants Spies, Schwab, Fielding, Neebe, and Parsons.

III.

The court erred in not allowing the defendants' challenge for cause to the jurors named in the bill of exceptions.

IV.

The court erred in refusing to permit the defendants to ask questions of jurors calculated to ascertain their bias or prejudice and qualifications as jurors.

V.

The court erred in refusing defendants' motion to have the jurors summoned from the jury list prepared by the county board after the regular panel was exhausted.

VI.

The court erred in denying defendants' several challenges to the array of jurors.

VII.

The court erred in permitting the State's attorney to exercise more than twenty peremptory challenges.

VIII.

The court erred in compelling the defendants to tender the State a panel of four instead of requiring the State to tender the defendants a panel of four jurors.

IX.

The court erred in refusing to permit the defendants to pass upon the jurors and exercise the right of peremptory challenge after the State had passed upon the jurors.

X.

The court erred in admitting improper evidence offered on behalf of the people.

XI.

The court erred in refusing to admit proper evidence offered by defendants.

XII.

The court erred in allowing the State's attorney on cross-examination of defendants and their witnesses on behalf of defendants to ask irrelevant and improper questions.

XIII.

The court erred in refusing to grant the motion to direct a verdict of not guilty as to the defendants other than Spies and Fischer at the close of the evidence on behalf of the State.

XIV.

The court erred in refusing to send out the jury previous to argument on motion to direct a verdict of not guilty as to Oscar Neebe and other defendants.

XV.

The court erred in refusing a new trial because the verdict is manifestly against the law and the evidence in the case.

XVI.

The court erred in giving people's instructions Nos. 3, 4, 5, 5½, 6, 7, 9, 10, 12, 13, and 13½.

XVII.

The court erred in refusing to give defendants' instructions marked "refused." (See record, vol. O, pp. 10 to 18, inclusive.)

XVIII.

The court erred in giving the instruction *sua motu*.

XIX.

The court erred in reading the instruction on behalf of the defendant Ling in particular, the making oral remarks in connection therewith, and finally withdrawing said instruction and marking it "refused" in the presence of the jury. (Record, vol. O, pp. 32 to 33.)

XX.

The court erred in refusing to order the examination of Otis S. Favor, on the motion for new trial, as to the misconduct of the special bailiff.

XXI.

The court erred in permitting the State's attorney to ask improper questions of witnesses called to testify to the character of Harry L. Gilmer for truth and veracity.

XXII.

The court erred in admitting improper evidence offered by the State in rebuttal.

XXIII.

The court erred in refusing a new trial asked on the ground of the misconduct of the State's attorney in his closing argument to the jury.

XXIV.

The court erred in refusing to grant a new trial by reason of the misconduct of the jurors in taking notes of the evidence during the trial.

XXV.

The court erred in making improper remarks in the presence and hearing of the jury.

XXVI.

The court erred in overruling the defendants' motion in arrest of judgment.

XXVII.

The court erred in giving judgment on the verdict.

XXVIII.

There is other manifest and material error in the record, by reason whereof plaintiffs severally pray that said judgment may be reversed, &c.

By W. P. Black and
Salomon & Zeisler,
Attorneys for Plaintiffs in Error.

Leonard Swett,
Of Counsel.

And after reviewing the examination of the juror Sanford the court say:

"We cannot see that the trial court erred in overruling the challenge for cause of the twelfth juror. This being so, it does not appear that the defendants were injured or that their rights were in any way prejudiced by his selection as a juryman."

The following are the names of the Jurors who tried the case:

James H. Cole, Record, vol. A, pp. 137, 200, 405.

S. G. Randall, " " B, p. 19.

Theodore Denker, Record, vol. B, pp. 112, 122, 285.

C. B. Todd, " " B, pp. 270, 285.

Frank S. Osborn, " " C, pp. 272, 443.

Andrew Hamilton, Record, vol. D, pp. 251, 350, 356.

Chas. A. Ludwig, " " D, pp. 343, 383.

J. H. Brayton, " " F, pp. 130, 139.

Alanson H. Reed, " " G, pp. 252, 311.

John B. Greiner, " " G, pp. 355, 411.

G. W. Adams, " " H, pp. 30, 38, 46.

H. T. Sanford, " " H, p. 293.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

IN THE MATTER OF THE PETITION

—OF—

AUGUST SPIES, ET ALS.,

FOR A WRIT OF ERROR TO THE SUPREME COURT OF ILLINOIS.

Petitioners desire, upon the argument ordered by the Court upon this application, and in connection with matter heretofore printed from the record for consideration upon their petition, to submit and call attention to the following further matter, appearing upon and from the record of said cause, in the Supreme Court of Illinois, and the transcript thereof now presented:

I.

The record shows that by the testimony of Theodore Fricke (vol. I, pp. 466–494) a large amount of manuscript was identified as by Spies, Schwab, Parsons, Rau, and per-

haps others; also Most's Science of Revolutionary War was identified, and the files of the *Arbeiter Zeitung, Fackel, Verbote,* and *Alarm.* All this evidence was duly objected to and exceptions noted, followed by a motion to exclude, which was overruled, and defendants excepted. Thereupon Edmund Furthman, assistant State's attorney, was called as a witness (vol. I, pp. 495–499), by whom it was shown that all the matter shown to and identified by Fricke was seized by the witness at the *Arbeiter Zeitung* building May 5, 1886, and had remained thence continuously in his possession until the date of his testifying. On cross-examination he admitted that the search of the *Arbeiter Zeitung* building on May 5, 1886, and the seizure of the material referred to were without any warrant of any kind, and that the doors were locked when the searching and seizing party reached the building, and the doors were opened by a locksmith sent for for that purpose (p. 497), and that the party that was engaged in this entering and carrying away of this property consisted of Mr. Grinnell and others (p. 498). Thereupon Eugene Seegur (vol. N, p. 500, *et seq.*) was called as a translator (and afterwards Mr. Gauss), and in connection with their testimony translations of all this manuscript, of various articles in the papers, and of Most's Science of Revolutionary War, so seized as aforesaid, were offered and received over the objection and exception of the defendants. The objection was frequently interposed, but its first general expression is found on page 502 of vol. I, as follows:

"Mr. SALOMON: We wish to interpose an objection here to all these articles and translations now sought to be introduced.

"Objection overruled; exception by defendants."

Subsequently (p. 505), motion was made to exclude said translations, &c., which motion was overruled, and exception taken by defendants. *Like* motions were made as to all this captured matter when introduced, and exception taken to the action of the court denying said motions.

With reference to the introduction of the letter and postal card from Most to Spies we call attention to the following matter omitted by inadvertence in the hurry of preparation from our former printed matter submitted to the court:

An inspection of the entire record shows, and this will not be contradicted, that the only letter and postal introduced in evidence on the trial are the letter and postal from Most to Spies obtained by officers Jones and Flynn from Spies' desk by the breaking open of the doors of the *Arbeiter Zeitung* building and the forcing of the desk in question, under the personal supervision of State's Attorney Grinnell, without any kind of warrant or authority, as shown by the testimony of Flynn, Jones, and Furthman heretofore cited. Said letter and postal were not identified until the State made Mr. Spies their witness for that purpose, and Mr. Spies was compelled by the court to submit to the State's examination, as heretofore shown by the citation from Spies' examination. The letter and postal having been thus identified by Spies under compulsion and exception, the record shows immediately on the close of the State's examination of Spies the following (vol. N, p. 102):

"Mr. INGHAM (*of counsel for the State*): We offer the letter in evidence, the letter referred to as Most's letter."

This was objected to by defendant, and, after argument, the record shows the following (vol. N, pp. 104, 105):

"The COURT: There isn't any doubt about it. Letters addressed to a person and received by him and not destroyed are admissible, if they relate to the subject-matter that is under investigation. * * * Read your translation.

"Defendants' counsel then and there excepted to the ruling of the court."

Thereupon the State called Mr. Gauss, the translator, and the record shows the following as to his examination and the letter and postal from Most referred to (vol. N., pp. 105–107):

"E. L. C. GAUSS, recalled by the People, was examined by Mr. INGHAM, and testified as follows:

"Q. Have you translated that letter?

"A. I did.

"Q. Is that translation correct?

"A. It is.

"The COURT: You agree, from the contents, that it is 1884?

"Mr. BLACK: It is agreed it is 1884; it must have been.

"The COURT: Make it 1884.

"The WITNESS: I took it for "5" originally, and showed it to a gentleman in the office, and he thought it was 5 also.

"The COURT: The parties agree from the contents it must have been 4.

Mr. GAUSS read in evidence the translation of the letter in the words and figures following, to wit:

"DEAR SPIES: Are you sure that the letter from the Hocking Valley was not written by a detective? In a week I will go to Pittsburgh, and I have an inclination to go also to the Hocking Valley. For the present I send you some printed matter. There the 'Sch.' and 'H.' also existed, but on paper. I told you this some months ago. On the other

hand, I am in a condition to furnish medicine, and the 'genuine' article at that. Directions for use are perhaps not needed with these people. Moreover, they were recently published in the 'Fr.' The appliances I can also send. Now, if you consider the address of Buchtell thoroughly reliable I will ship twenty or twenty-five pounds. But how? Is there an express line to the place, or is there another way possible? Paulus the Great seems to delight in hopping around in the swamps of the N. Y. V. Z. like a blown up (bloated) frog. His tirades excite general detestation. He has made himself immensely ridiculous. The main thing is only that the fellow cannot smuggle any more rotten elements into the newspaper company than there are already in it. In this regard the caution is important to be on the minute. The organization here is no better nor worse than formerly. Our group has about the strength of the North Side group in Chicago, and then, besides this, we have also the Soc. Rev. 6, 1, the Austrian League, and the Bohemian League, so to say, three more groups. Finally, it is easily seen that our influence with the trade organizations is steadily growing. We insert our meetings in the Fr. and cannot notice that they are worse attended than at the time when we get through weekly $1.50 and $2.00 into the mouth of the N. Y. M. V. Z.

"Don't forget to put yourself into communication with Drury in reference to the English organ. He will surely work with you much and well. Such a paper is more necessary as to truth. This, indeed, is getting more miserable and confused from issue to issue, and in general is whistling from the last hole. Enclosed is a fly-leaf which recently appeared at Emden., and is perhaps adapted for reprint. Greeting to Schwab, Rau, and to you. Your Johann Most. P. S.—To Buchtell I will of course write for the present only in general terms."

"A. Spies, No. 107 Fifth avenue, Chicago, Illinois."

Mr. INGHAM: Did you translate the postal card?

A. I did translate this postal card.

Q. Is it correct?

A. It is.

Defendants' counsel objected to its introduction in evidence on the grounds already stated. The court overruled the objection, to which ruling of the court counsel for defendants then and there excepted.

The WITNESS (reads): The address is "Dear Spies, 107 Fifth avenue, Chicago, Illinois."

Mr. ZEISLER: You have no right to interpret. It is addressed "L. S."

The WITNESS: L. S.; that is what it stands for.

The COURT: If there is any usage in the German language as to the letter L. you may state that usage.

The WITNESS: There is this usage, that the letter L. and the first letter of the name always stand for lieber so-and-so—Lieber Spies in this connection. (Reads:) "I had scarcely mailed my letter yesterday when the telegraph brought news from H. T. H. One does not know whether to rejoice over that or not. The advance is in itself elevating. Sad is the circumstances that it will remain local, and, therefore, might not have a result. At any rate, these people make a better impression than the foolish voters on this and the other side of the ocean. Greetings and a shake. Yours, J. M.

"Drury, I suppose (hope), can now and then receive upon tickets."

II.

With reference to the matter of the jury we desire to submit the following additional suggestions and matter shown by the record:

The statute of Illinois provides for the swearing of the jury to try the cause in panels of four. The last panel of four, as shown by the record, was never accepted by defend-

ants. After their peremptory challenges were exhausted and their challenge for cause against Sanford had been overruled, and their exceptions preserved, the record shows that defendants declined to take any further action (H, 307). The panel of four was then sworn without their assent and sat on the trial of the cause.

If it should be suggested that after the examination of Mr. Adams, the eleventh man examined, who sat as a juror, defendants still had a number of peremptory challenges with which they could have then excluded Greiner, Reed, and Adams from the panel, and that these challenges were improvidently used in excluding from the jury unobjectionable men, the reply is two fold:

(1.) The record shows that Mr. Adams was tendered to the defendants by the State with Mr. Greiner, Mr. Reed, and Mr. Quinlan (H, 35). Mr. Quinlan was, upon examination by the defendants, challenged for cause, and the challenge sustained.

Thereupon defendants were required to fill the panel of four, and did so by Mr. Cassady (H, 56), who was challenged by the State for cause. The State then, after examining B. H. Patterson, who admitted he had an opinion as to the guilt or innocence of the defendants, tendered to the defendants Greiner, Reed, Adams, and Patterson (H, 63).

Patterson was then challenged peremptorily by defendants.

Thereafter defendants examined 98 panelmen, of whom 56 were excused for cause (vol. H, pp. 65, 67, 71, 73, 75, 77, 79, 81, 83, 87, 89, 95, 101, 106, 108, 117, 119, 121, 122, 124, 126, 132, 134, 141, 143, 145, 147, 151, 154, 156, 173, 175, 177, 179, 194, 198, 202, 208, 211, 214, 216, 228, 234, 236, 240, 244, 245, 247, 251, 253, 267, 274, 279, 284, 288, & 292), and 42 were challenged peremptorily.

But of those thus peremptorily challenged the record (vol. H) shows that the examinations developed, as to their attitude and state of mind, the following facts—twenty of them—to wit:

Porter (p. 69), Rowe (p. 84), Roberts (p. 93), Myers (p. 96), Carr (p. 98), Koontz (p. 110), Cavanaugh (p. 112), Nelson (p. 115), Conkling (p. 183), Atwater (p. 191), Levi (p. 218), Roberts (p. 223), Enright (p. 226), Hartney (p. 230), Beveridge (p. 232), Hugenon (p. 242), Kueken (p. 255), Madden (p. 257), Wineberger (p. 259), & Ruck (p. 262) had formed and expressed an opinion, still entertained, touching the guilt or innocence of the defendants, some of them saying the opinion was strong and firm, and some saying they had a firm or even enthusiastic prejudice against or decided opposition to socialists, communists, and anarchists. Of these Porter, Rowe, Roberts, Carr, Koontz, Nelson, and Conkling were first challenged on their answers for cause, challenge overruled, and then challenged peremptorily.

Of the 22 others, Beedle (p. 103), Nicholas (p. 104), Hall (p. 128), Ellsworth (p. 130), Graves (p. 149), Aldrich (p. 181), Phelps (p. 188), McKenzie (p. 195), Kane (p. 201), West (p. 269), Beers (p. 286), and Wait, late chief deputy sheriff of Cook county, (p. 297) were opposed to socialists, anarchists, and communists, and many of them to all organizations and organizers of labor, while McElwain (p. 193) admitted a present prejudice against the defendants; Sullivan (p. 273) and Bennett (p. 281) had an opinion as to defendants' guilt and a strong prejudice against socialists, communists, and anarchists; Haaker (p. 265) had an opinion touching the defendants' guilt or innocence; while Brown (p. 140) was objected

to as not a citizen, the challenge for cause was overruled, and he was then challenged peremptorily. This leaves only Wynne (p. 88), Walcott (p. 113), Metcalf (p. 186), Fay (p. 271), & Bowman (p. 277) against whom the peremptory challenge was used without cause apparent on the record. Of those in this 22, besides Brown, the following were first challenged for cause on their answers, challenge overruled, and then challenged peremptorily, to wit, Beedle, Nicholas, Hall, Ellsworth, and Graves.

(2.) But our second reply is, that the peremptory challenge is an unrestrained personal privilege of the defendants, which may be exercised by them arbitrarily and without inquest as to their motives or the considerations possibly influencing their action. It is sufficient to support their contention herein, that defendants were compelled to submit to a trial by a partial jury, when the record shows that the statute, as interpreted by the State court, provides for such a jury; that defendants' peremptory challenges were, in fact, exhausted, and that, in fact, partial jurors were upon the panel against defendants' objection and right.

123-131

IN THE MATTER

of

THE PETITION OF AUGUST SPIES AND OTHERS, FOR WRIT OF ERROR.

BRIEF FOR PETITIONERS.

M. SALOMON,
W. P. BLACK,
ROGER A. PRYOR,
J. RANDOLPH TUCKER,
Of Counsel for Petitioners.

In the Matter
of
The Petition of August Spies and others, for Writ of Error to the Supreme Court of the State of Illinois.

PETITIONER'S POINTS.

Petitioners, jointly indicted, tried and convicted of murder in the Criminal Court of Cook County, Illinois, took the case by writ of error to the Supreme Court, where the judgment was affirmed, and the petitioners sentenced to be executed on the 11th of November, 1887.

I.

By Section 709 of the Revised Statutes, the Supreme Court of the United States has jurisdiction to re-examine "a final judgment in any suit in the highest court of a State, where is drawn in question the validity of a statute of, or any authority exercised, under a State, on the ground of their being repugnant to the Constitution of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution (of the United States), and the decision is against the title, right,

privilege or immunity specially set up or claimed, by either party, under such Constitution."

Invoking the exercise of the appellate power of the Supreme Court, thus conferred, petitioners allege the following Federal questions to be involved and presented in the case, namely:

FIRST.—Petitioners challenged the validity of the Statute of Illinois, under and pursuant to which, the trial jury was selected and empanelled, on the ground of repugnancy to the Constitution of the United States, and the State Court sustained the validity of the Statute.

SECOND.—Petitioners asserted and claimed, under the Constitution of the United States, the right, privilege and immunity of trial by an impartial jury, and the decision of the State Court was against the right, privilege and immunity so asserted and claimed.

THIRD.—The State of Illinois made, and the State Court enforced against petitioners, a law (the aforesaid Statute) whereby the privileges and immunities of petitioners as citizens of the United States, were abridged, contrary to the Fourteenth Amendment of the Federal Constitution.

FOURTH.—Upon their trial for a capital offense, petitioners were compelled by the State Court to be witnesses against themselves, contrary to the provisions of the Constitution of the United States, which declare that "no person shall be compelled in any criminal case to be a witness against himself," and that "no person shall be deprived of life or liberty without due process of law."

FIFTH.—That by the action of the State Court in said trial, petitioners were denied "the equal protection of the laws," contrary to the guaranty of the said Fourteenth Amendment of the Federal Constitution.

1.

If, upon the record, it be reasonably doubtful whether a Federal question is involved, the writ will be allowed; because, on the one hand, if it be wrongly refused, the petitioners will be remediless, while on the other, the error of the Justice in allowing the writ may be promptly corrected by its dismissal upon motion in Court.

"Writs of Error to State Courts cannot issue without the allocatur of a Judge of this Court. Yet there is hardly a term in which a case of this description has not been dismissed upon the ground that the transcript did not show a case in which a writ of error would lie. A contrary doctrine would be exceedingly inconvenient if it could be maintained, and would throw upon a single Judge the responsibility which properly belongs to the Court. And it does not by any means follow that the Judge who authorized the appeal has made up his mind that the party is entitled to it. He may, and no doubt does, entertain doubts upon the subject, or may regard the point as new and undecided, and upon which different opinions may be entertained, and in such cases he grants the appeal to bring the matter before the Court, and enable it to decide for itself, whether the case is or is not within the appellate jurisdiction as regulated by Congress."

Taney, C. J., in Callan *vs.* May, 2 Black, 543.

Here, undoubtedly, are presented questions of great moment not yet adjudicated by this Court; and the lives of seven human beings are suspended on the event of this application. A mistaken allowance of the writ would only adjourn their execution for the brief period till the Court determine its lack of jurisdiction.

2.

If a Federal question be sufficiently apparent, the writ will be allowed without consideration of the question itself—for, here the only inquiry is as to the fact of jurisdiction; but to pass upon the merits of the case would be an exercise of jurisdiction, to which, moreover, not a single Justice, but the Court alone, is competent.

Upon application for a Writ of Error to a State Court, the simple and single duty of the Justice is, "to ascertain whether any question cognizable here on appeal, was made and decided by the proper Court of the State, and whether the case, on the face of the record, will justify the allowance of the writ," and "the allowance will be made where the decision appears to have involved a question within our appellate jurisdiction."

Twitchell *vs.* Commonwealth, 7 Wall, 324.
Gleason *vs.* Florida, 9 Wall., 783.

To give this Court jurisdiction, "it need not appear that the State Court erred in its judgment."

Furman *vs.* Nichol, 8 Wall., 56.

In Bohanan *vs.* Nebraska, 118 U. S., 231, the only ground alleged for the appellate jurisdiction of the United States Supreme Court was, that the petitioner had been put twice in jeopardy "in violation

and disregard of Article V. of the Amendments to the Constitution of the U. S.;" but, although the provision of the Constitution relied on was obviously inapplicable to the case, a writ of error was allowed —nay, more, a motion to dismiss for want of jurisdiction was denied by the Court, which held that it "will not consider the merits of the question involved in a case, on a motion to dismiss unaccompanied by a motion to affirm."

In Pennywit *vs.* Eaton, 15 Wall., 380, "The Court refused to dismiss, for want of jurisdiction, although they had a very clear conviction that the decision of the State Court was correct"—so clear, indeed, that afterward, they affirmed the judgment of the State Court with 10 *per cent.* damages, "because any writ of error would have been prosecuted only for delay."

Where the existence of the Federal question is so closely connected with the question of its validity that the Court will not undertake to separate them, the writ will not be denied or dismissed.

Millingan *vs.* Hartupee, 6 Wall., 258, 260.

In Hall *vs.* Jordan, 3 Wall., 393, 395, the Court said: "However frivolous the objection, it raised a Federal question" acc. Arrowsmith *vs.* Harmoning, 118 U. S., 195, Church *vs.* Kelsey, 121 U. S., 282; R. R. Co. *vs.* Maryland, 20 Wall., 643; Hayes *vs.* Missouri, 120 U. S., 68. Foster *vs.* Kansas, 112 U. S., 206.

3.

The particular provision of the Federal Constitution, under which the right, privilege or immunity is claimed, or to which the State law is repugnant, need not be indicated upon the record; but it suffices to make a general claim of protection under the Constitution of the United States.

"A party relying on this Court for re-examination and reversal of the judgment of the highest State Court, under the 25th Section of the Judiciary Act of 1789, need not set forth specially the clause of the Constitution of the United States, on which he relies. If the pleadings (or proceedings) make a case which necessarily comes within the provisions of the Constitution, it is enough." The Bridge Proprietors *vs.* The Hoboken Company, 1 Wall., 116.

"It is urged that the particular provision of the Constitution, which the plaintiffs in error say has been violated in its application to their case, should be contained in the pleadings (or proceedings); but this is in no case necessary." Furman *vs.* Nicholl, 8 Wall., 56.

"Wherever rights, acknowledged and protected by the Constitution of the United States, are denied or invaded by state legislation, which is sanctioned by a judgment of a State Court, this Court is authorized to interfere. Its jurisdiction, therefore, to re-examine such judgment, cannot be defeated by showing that the record does not in direct terms, refer to some constitutional provision, nor expressly state that a Federal question was presented. The true jurisdictional test is, whether it appears that such a question was decided adversely to the Federal right." Murray *vs.* Charleston, 96 U. S., 432; Dugger *vs.* Bocock, 104 U. S., 603.

"It is not required that the record should, in terms, state a misconstruction of an act of Congress, or that it was drawn in question. It is sufficient to to give the Court jurisdiction of the cause, that the record should show that an act of Congress was applicable to the case."

Miller *vs.* Nichols, 4 Wheaton, 311.

"It is not necessary that the question should appear on the record to have been raised, and the de-

cision made in direct and positive terms, ipsissimis verbis ; but it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment."

Crowell *vs.* Randall, 10 Peters, 368.

"If a State Court gives such a construction to a State Statute as to make it conflict with the United States Constitution, and thereby deprives a party of his rights under said Constitution, then a Federal question is raised."

Ins. Co. *vs.* Treasurer, 11 Wall., 209.

"When the Court can see a Federal question, though raised somewhat obscurely, and though they have a very clear conviction that the decision of the State Court was correct" the Writ of Error will not be dismissed.

Pennywit *vs.* Eaton, 15 Wall., 380.
Craig *vs.* Whe. State, 4 Peters, 410.

"Error will lie to the Supreme Court of a State, where a Federal question is raised and decided against by rulings asked for and refused; even though the case may have been disposed of generally, by the Court on other grounds." Minnesota *vs*, Bacheller, 1 Wall., 109.

"This Court may re-examine the judgment of a State Court when the record shows affirmatively or by fair implication, that a Federal question necessary to the determination of the cause was involved." Boughton *vs.* Exchange Bank, 104 U. S., 427.

4

In the last formal exposition by this Court of the 25th Section of the Act of 1789, the rule of jurisdic-

tion was stated thus: "A cause can be removed from a State Court into this Court under the 25th Section of the Act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right, which he asserted that it gave him, was denied to him by the State Court; provided the record shows, either by express averment, or by clear and necessary intendment, that the constitutional provision did arise, and that the Court below could not have reached the conclusion and judgment it did reach, without applying it to the case in hand." Furman *vs.* Nichol, 8 Wall., 44.

But the jurisdiction of this Court to re-examine the judgments of the highest State Court, is regulated now, not by the Act of 1789, but by the Act of 1867, sec, 2.

Murdock *vs.* The City of Memphis, 20 Wall., 590.

1st. The Act of 1867, as is apparent from the proceedings in Congress (Cong. Globe, 1st Sess. 39th Congress, Part 5, pages 4151, 4229), was passed with a view to enlarge the scope and facilitate the effect of the appellate jurisdiction of this Court over State judgments (20 Wall., 594), especially, by relaxing the stringency of the former rule as to the appearance of the Federal question on the record. 20 Wall., 591.

2d. Hence, first, by the Act of 1867, this Court has jurisdiction "where any title, right, privilege, or immunity is claimed under the Constitution, and the decision is against such title, &c., specially set up or claimed; and secondly, the requirement in the Act of 1789 that the Federal question must appear on the "face of the record," is omitted from the Act of 1867. Rev. Stat., sec. 709.

Wherefore, upon construction of the Act of 1867, in Murdock *vs.* Memphis, the Court enunciated the condition of its appellate jurisdiction to be, "that it shall appear that one of the questions mentioned in the Statute must have been raised and presented to the State Court; that it must have been decided by the State Court against the right claimed or asserted by the plaintiff in error, under the Constitution, &c.; or that such decision was necessary to the judgment rendered in the case." 20 Wall., 591.; Gross *vs.* U. S. Mortgage Co., 108 U. S., 484.

"And a case arises under the Constitution of the United States not merely where a party comes into Court to demand something conferred upon him by the Constitution, but whenever its correct decision as to the right, privilege, claim, protection or defence of a party, in whole or in part, depends upon the contruction of the Constitution."

Tennessee *vs.* Davis, 100 U. S., 258.

5.

It is not necessary to the jurisdiction of the United States Supreme Court, that the highest State Court in terms passed upon petitioners' claim of right, privilege and immunity under the United States Constitution, or their claim that the Illinois Statute is in derogation of that Constitution. "The Supreme Court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the Court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the Constitution of the United States But the final judgment necessarily involved an adjudication of that claim: for, if the Statutes upon the authority of which alone the auditor of the State proceeded, are repugnant to the National Constitution, that judgment could not properly have been rendered. This

Court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States, has been withheld or denied by the judgment below. And our jurisdiction is not defeated, because it may appear, upon examination of this Federal question, that the Statutes of Illinois are not repugnaut to the provisions of that instrument Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the Writ of Error upon the ground that the record does not raise any question of a Federal nature must, therefore, be denied."

Chicago Life Ins. Co. *vs.* Needles, 113 U. S., 579.

The judgment of a State Court is reviewable by the United States Supreme Court, if the State Court "knew or ought to have known that a Federal question was involved in the decision to be made."

Brown *vs.* Colorado, 106 U. S., 95–97.

The United States Supreme Court has jurisdiction in error, over the judgment of the Supreme Court of a State, when it necessarily involves the decision of the question, raised in that Appellate Court for the first time, and not noticed in its opinion, whether a statute of the State conflicts with the Constitution of the United States."

Arrowsmith *vs.* Harmoning, 118 U. S., 194.

In Arrowsmith *vs.* Harmoning, *supra*, the only way in which a Federal question was made apparent of record was, by this assignment of error in the Supreme Court of the State, namely: "That by affirming the judgment of the Court of Common Pleas by said District Court, this plaintiff in error

was deprived of his right of trial by jury, contrary to the provisions of the Constitution of this ~~Court~~ State, and deprived of his property without due process of law, contrary to the provisions of the Constitution of the United States." The Writ of Error having been allowed, a motion to dismiss for want of jurisdiction, was made and denied—the Court ruling that the Federal question was sufficiently apparent on the record.

In Murdock *vs.* Memphis, 20 Wall., 634, the Court said in view of the Act of 1867, that "we are not prepared to fix any absolute limit to the sources of inquiry under the new act," in determining whether a Federal question was involved and decided.

In Walker *vs.* Sauvinet, 92 U. S., 92, the Court held jurisdiction although the only objection apparent on the record was "that the act was unconstitutional but without specifying in what particular."

6.

The Federal question may be raised and presented by the rulings of the Court on offers of evidence (Hall *vs.* Jordan, 3 Wall., 393); and by the reasons given by the Court for its rulings (Beer Company *vs.* Massachusetts, 97 U. S., 31), and by implication on the decision of a demurrer (Williams *vs.* Bruffy, 96 U. S., 182; Ford *vs.* Surget, 97 U. S., 602, Armstrong *vs.* Treasurer, 16 Peters, 281).

So, for the existence and decision of a Federal question, we may look to the opinion of the State Court, especially of Illinois (Gross *vs.* Mortgage Company, 108 U. S., 477, 486; Philadelphia Fire Ins. Co., 119 U. S., 110, 116). *

And, the decision of the Federal question need not be the principal ground of judgment in the State Court (R. R. Co. *vs.* Maryland, 21 Wall., 457).

* Murdock v. Memphis 20 Wall: 591

Furthermore, it suffices to raise the Federal question, for the first time, in the State Supreme Court; and it is presented here even though that Court take no notice of it (Arrowsmith *vs.* Harmoning, 118 U. S., 194; Bohanan *vs.* Nebraska, 118 U. S., 231, 232; Hurtado *vs.* California, 110 U. S., 516).

7.

The State Courts adjudicated that the Illinois Statute authorized the empanelling of jurors with a preconceived and present opinion as to the guilt of petitioners; and "accepting that construction as conclusive," the United States Supreme Court may hold "that the act is unconstitutional and void" Hall *vs.* De Cuir, 95 U. S., 485.

But, if, upon construction of the Illinois statute, it be deemed by its terms not to compel or authorize the empanelling of a partial or incompetent jury, still the State Court did, against the objection of petitioners, admit upon the jury partial, prejudiced and incompetent persons; and did, against the objection of petitioners, exclude proper and legal questions propounded to ascertain and determine the indifference and impartiality of proposed jurors—and so by the Act of the State Court petitioners were denied that "due process of law" guaranteed to them by the Fourteenth Amendment of the United States Constitution.

"Though the law itself be fair on its face and impartial in appearance, yet if it is applied and admistered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution" (Yick Wo *vs.* Hopkins, 118 U. S., 366, 373–4).

"In whatever language a Statute may be framed, its purpose and constitutional validity must be determined by its natural and reasonable effect" (Henderson *vs.* The Mayor, 92 U. S., 259.

"A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision therefore must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws" (due process of law). "Whoever, by virtue of public position under a State government, deprives another of life, liberty or property without due process of law violates the constitutional inhibition; and as he acts in the name of and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with the power to annul or evade it." Ex Parte Virginia, 100 U. S., 339, 347; Strauder *vs.* West Virginia, 100 U. S., 303, 310; Virginia *vs.* Rives, 100 U. S., 313, 318; Neal *vs.* Delaware, 103 U. S., 370, 397; Civil Rights Case, 109 U. S., 3, 11, 13, 15.

Indeed, judicial decisions have all the attributes and effects of law, as much so as formal enactments of the Legislature. Austin's *Province of Jurisprudence*, Vol. 2, Lectures XXXVII. and XXXVIII.; Pomeroy's *Introduction to Municipal Law*, Part 1, Chap. III.

It results also, that the right and immunity of Petitioners, explicitly claimed under the Constitution of the United States, not to be compelled to be witnesses against themselves, was denied them by the *State* when it was denied them by the Judiciary of the State (Boyd *vs.* United States, 116 U. S., 616).

So that, here are Federal questions, of immense moment, duly raised and presented "on the face of

the record"; and within the terms of the most technical rule, the jurisdiction of the Supreme Court attaches.

II.

It is confidently submitted, therefore, that in the light of the frequent and uniform adjudications of the United States Supreme Court, Federal questions are here sufficiently apparent to entitle petitioners to the Writ of Error they solicit. Whether to allow or refuse the writ is not a matter of judicial discretion; but, if a federal question be involved and presented, in compliance with the requirements of the Statute—and this is the only question for determination by the Justice to whom application is made—the writ issues *ex debito justitiae*. To hold otherwise would be to make the jurisdiction of the Court depend, not upon the law which confers and defines it, but upon the undefinable and irresponsible volition of any member of the Court.

In passing the Act of 1867, "it was the purpose of Congress to secure to every litigant whose rights depended on any question of federal law, that the question should be decided for him by the highest federal tribunal, *if he desired it.*" Murdock *vs.* Memphis, 20 Wall., 632.

The petitioners come to this Court, as to the last refuge, in quest of that security to life and liberty which the Constitution of the nation guarantees to them, and they are well assured by the deliverances and decisions of the Court, that their approach will not be repelled upon any rigid or severe construction of the Statute—

"Constitutional provisions for the security of person and property should be liberally construed,

and it is the duty of Courts to be watchful for the constitutional rights of the citizen." (Boyd *vs.* United States, 116 U. S., 617, 635.)

"The Statute is a remedial one, and should be construed liberally to carry out the wise and salutary purposes of its enactment" (Stewart *vs.* Kuhn, 11 Wall., 504); in this instance, to extend the protection of the national authority over the lives and liberties of the people.

Respectfully submitted.

M. SALOMON,
W. P. BLACK,
ROGER A. PRYOR,
J. RANDOLPH TUCKER,
Of Counsel for Petitioners.

123-131

Supreme Court of the United States.

IN THE MATTER OF THE PETITION

OF

AUGUST SPIES AND OTHERS.

BRIEF FOR PETITIONERS.

ROGER A. PRYOR,
Of Counsel for Petitioners.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

IN THE MATTER OF THE PETITION OF AUGUST SPIES AND OTHERS, FOR WRIT OF ERROR TO THE SUPREME COURT OF ILLINOIS.

Supplemental Brief for Petitioners.

A.

Petitioners allege that by the statute of Illinois and by the action of the State court, they were convicted of a capital offense without due process of law, contrary to the guarantees of the Fourteenth Amendment of the Constitution of the United States.

I.

The Illinois statute is not "due process of law" within the meaning of that provision of the Constitution.

1.

In capital cases "due process of law" implies and requires trial by jury.

1st. What is "due process of law?"

"Not any statute the Legislature may choose to enact is 'due process of law,' but to be such the statute must conform to the settled usages and modes of proceeding existing in the common and statute law of England before the emigration

of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been enacted by them after the settlement of this country."

Murray's Lessees *vs.* Hoboken Company, 18 Howard, 276.

"Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail or has no application where the invasion of private rights is effected by State legislation."

Davidson *vs.* New Orleans, 96 U. S., 102.

"'The law of the land' does not mean merely an act of the Legislature, for that construction would abrogate all restrictions on legislative authority. The clause means that statutes which would deprive a citizen of the rights of person and property without a regular trial according to the manner and mode of the common law, would not be the law of the land."

Hoke *vs.* Henderson, 4 Dev., 15.

Wyneharmer *vs.* The People, 13 N. Y., 395.

"The words 'by the law of the land' do not mean a statute passed for the purpose of working the wrong. The meaning seems to be that no member of the State shall be deprived of his rights and privileges, unless the matter be adjudged against him upon a trial had according to the form of the common law. * * * The words 'due process of law' cannot mean less than a prosecution according to the prescribed forms and solemnities for ascertaining guilt."

Porter *vs.* Taylor, 4 Hill, 140.

"This language must be taken with the important limitation, that the forms and solemnities required must be such

as were essentially in existence at the time of forming the Constitution, as a part of the ordinary means of administering justice."

Pomeroy's Constitutional Law, 163.

"The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land' in the Great Charter in connection with the writ of *habeas corpus*, the trial by jury, and other guarantees of the rights of the subject against the power of the crown. It is found in the Fifth Amendment to the Constitution in connection with other guarantees of the same character."

Davidson *vs.* New Orleans, 96 U. S., 101, 107.

"By due process of law is meant one which, following the forms of law, is appropriate to the case and just to the party affected."

Hagar *vs.* Reclamation, 111 U. S., 708.

"As to the words 'due process of law' they were intended to secure the individual from the arbitrary exercise of the powers of Government, unrestrained by the established principles of private right and distributive justice."

Burk *vs.* Okley, 4 Wheat., 244.

"The terms 'due process of law,' when applied to judicial proceedings, mean a course of legal proceeding according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights."

Pennoyer *vs.* Neff, 95 U. S., 714.

"Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen."

Cooley on Const. Lim., 356.

Hurtado *vs.* California, 110 U. S., 527–528.

"Due process of law means a due course of legal proceedings according to those rules and forms which have been established for the protection of private rights."

Kennard *vs.* Louisiana, 92 U. S., 431.

"In judging what is 'due process of law' respect must be had to the cause and object of the taking, * * * and, if found suitable or admissible in the special case, it will be adjudged to be due process of law; but, if found to be arbitrary, oppressive, and unjust, it may be declared to be *not* due process of law."

Davidson *vs.* New Orleans, 96 U. S., 110.

To be due process of law State legislation must be "exerted within the limits of those fundamental principles which lie at the base of our civil and political institutions."

Hurtado *vs.* California, 110 U. S., 535.

"The principle (due process of law) does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue. It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to loss of life or liberty, then the deprivation has not been by 'due process of law.'"

Brown *vs.* Commissioners, 50 Miss., 478–487.

Cited with approval by this Court (Matthews J.) in Hurtado's case, 110 U.S. 536.

"The words 'due process of law' mean law in its regular course of administration, according to prescribed forms, and in accordance with the general rules for the protection of individual rights."

Rowan *vs.* The State, 30 Wis., 139.

If the accused be deprived of his life or liberty without

being personally present throughout the trial such depriva tion would be without due process of law.

Hopt *vs.* Utah, 110 U. S., 579.

For another instructive illustration of what is not due process of law in judicial proceedings, see *In Re* Zeibold, 23 Federal Reporter, 791.

2d. Since, then the statute, to be due process of law, must conform to "the settled modes and usages of proceeding existing in the common and statute law of England before the emigration of our ancestors," and since, to be due process of law, State legislation must be "exerted within the limits of those fundamental principles of liberty and justice which lie at the base of our civil and political institutions," it follows that the trial of a capital cause without a jury, would not be due process of law; for, immemorially and universally, under the English and American system of jurisprudence, capital offenses have been tried not otherwise than by jury.

4 Black. Comm., 349.

By clause 20 of Magna Charta it was provided that amerciaments for a small fault or a great crime shall not be assessed "but by the oath of honest men of the neighborhoods," and by clause 39 that no man shall be "anyways destroyed but by the lawful judgment of his peers or by the law of the land."

By an act passed in the fourteenth year of Edward the IV, the justices of the King's bench were authorized to examine Bodrugan and Bonethon on a charge of felony, and upon their default they were so convicted and condemned to death;

but, upon their petition to the Crown, the judgment was annulled on the ground that "By the act it was ordained that the trial of said offenses should rest and be by examination and not by the verdict of twelve men, after the common course of the laws of the land."

Creasy on the English Constitution, 243.

By the petition of right (3 Car., 1 Ch., 1), upon complaint that offenders had been brought to trial before commissioners "by such summary course and order as is agreeable to martial law," the people of England demanded that no man should "be put to death without being brought to answer by due process of law," in conformity with the act of the 28th Edward the Third.

In all the American colonies capital cases were tried by jury.

The earliest act of the colonies, in their collective capacity, 14th Oct., 1774, was to issue a declaration of rights and grievances, wherein "it was unanimously resolved that the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers."

In the Declaration of Independence it is made an article of accusation against George III that "he has deprived us, in many cases, of the benefits of trial by jury."

By section 2, article 3, of the Constitution of the United States, it is provided that "the trial of all crimes, except in cases of impeachment, shall be by jury."

"The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury."

Hamilton, Dawson's Federalist, 581.

At the time of the adoption of the Fourteenth Amendment of the Constitution, in every State of the Union capital offenses were triable only by jury.

"It is never to be forgotten that in the construction of the language of the Constitution we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."

Ex Parte Bain, 121 U. S., 12.

Terms are introduced into the Constitution of this country with their technical common-law signification.

Sedgwick on the Construction of Statutory and Constitutional Law, page 225, note *a*.

"The trial by jury in all cases, civil and criminal, was as firmly and as universally established in the colonies as in the mother country."

1 Story on Const., sec. 165.

2 Story on Const., secs. 1779–1782.

2.

Due process of law implies and requires a trial by an *impartial* jury.

1st. This must be so, else trial by jury would be, as Lord Denman said in O'Connell's case, "a mockery, a delusion, and a snare." A trial by a packed or partial jury is no *trial*, any more than the cast of a loaded die determines a contingent event. If the jury have prejudged the case the event is determined in advance of the so-called trial. Under the form of a trial the jury would merely register a foregone conclusion.

2d. It is so by all authorities.

"A jury is generally understood to mean, *ex vi termini*, a jury of twelve men *impartially* selected, who must unanimously concur in the guilt of the accused. Any law, therefore, dispensing with any of these requisites may be considered unconstitutional." (Paschal's Annotated Con., 210; Work *vs.* State, 2 Ohio State, 296; State *vs.* Cox, 2 English, 436; People *vs.* Johnson, 2 Parker C. C., 322; People *vs.* Fisher, 2 Parker C. C., 402; People *vs.* Toynbee, 2 Parker C. C., 562; Caneemi *vs.* People, 18 N. Y., 135; 2 Leading Criminal Cases, 327, note; Story on the Constitution, sec. 1779.)

"This privilege (trial by jury) is a vital principle underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be *frittered away* on any plea of State or political necessity."

Ex Parte Milligan, 4 Wallace, 123.

"No man should be convicted of an infamous offense until twelve fair-minded jurors are convinced of his guilt."

Address by Judge Miller before the Bar Association.

"The colonists who established the English colonies in this country undoubtedly brought with them the common and statute laws of England as they stood at the time of their immigration, so far as they were applicable to the situation and local circumstances of the colony, and among the most cherished and familiar principles of the common law was the trial by jury in civil, and still more especially in criminal, cases; and however the colonies may have varied in other respects, in the modifications with which the common or statute law was adopted, the trial by jury, in all of them of English origin, was regarded as a right of inestimable value and the best and only security of life, liberty, and

property. * * * The provisions in the State constitutions securing trial by jury were overlooked in the Constitution of the United States as originally framed, but as soon as the public attention was called to the fact that these securities of a *fair* and *impartial* trial by jury in criminal cases, had not been inserted among the cardinal principles of the new Government, they hastened to amend it."

United States *vs.* Reid, 12 How., 363, 364.

"In all criminal prosecutions, the Constitution guarantees to the accused 'a trial by an impartial jury'—that is, a jury unbiased, just; a jury that will give him the benefit of all his rights, including that of the presumption of his entire innocence of crime until proven guilty. *And it is the duty of the court to see that this guarantee is enforced.*"

Olive *vs.* The State, 11 Neb., 23.

"The great object of a trial by jury in criminal cases is to guard against a spirit of oppression and tyranny on the part of rulers and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter than the former. The sympathies of all mankind are enlisted against the revenge and fury of a single despot, and every attempt will be made to screen his victims; but how difficult is it to escape from the vengeance of an indignant people roused to hatred by unfounded calumnies or stimulated to cruelty by bitter political enmities or unmeasured jealousies! The appeal for safety can, under such circumstances, scarcely be made by innocence in any other manner than by the severe control of courts of justice and by the *firm* and *impartial* verdict of a jury sworn to do right and guided solely by legal evidence and a sense of duty. In such a course there is a double security against the prejudices of judges who may partake of the wishes and opinions of the Government and against the passions of the multitude

who may demand their victim with a clamorous precipitancy. So long, indeed, as this palladium remains sacred and inviolable the liberties of a free government cannot wholly fall; but to give it real efficiency it must be preserved in its purity and dignity, and not, with a view to slight inconveniences or imaginary burdens, be put into the hands of those who are incapable of estimating its worth or are too inert or too ignorant or too imbecile to wield its potent armor. Mr. Justice Blackstone, with the warmth and pride becoming an Englishman living under its blessed protection, has said: "A celebrated French writer, who concludes that because Rome, Sparta, and Carthage have lost their liberties therefore those of England in time must perish, should have recollected that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to trial by jury.'"

2d Story on Constitution, sec. 1780.

3d. A juror having an opinion, not hypothetical, as to the guilt of the accused, is a *partial*, and so an incompetent, juror.

A juror must have "such freedom of mind as he stand indifferent, as he stand unsworn."

1 Coke Litt., 155-*a*, note (*d*).

Jurors must be "indifferently chosen and superior to all suspicion."

4 Black. Comm., 249.

By the Bill of Rights (William and Mary) complaint was made of the empannelling of *partial* juries, and the demand was that juries should thereafter be "duly empannelled."

"The constitution of Missouri and, indeed, of every State in the Union, guarantees to all persons accused of a capital

offense, or of any felony, the right to trial by an impartial jury, and this implies that the juror shall be free from all bias for or against the accused."

Hayes *vs.* Missouri, 120 U. S., 69, 70.

"It is good ground for challenge for cause that a juror has formed an opinion as to the issue to be tried. * * * The theory of the law is that a juror who has formed an opinion cannot be impartial."

Waite, C. J., in Reynolds *vs.* United States, 98 U. S., 155.

"The fact that the juror had not expressed his opinion is important only as tending to show that he had not formed one which disqualified him. If a positive and decided opinion had been formed he would have been incompetent, although it had not been expressed."

Id., 157.

(In this case the witness Reed was held competent, but he only swore that he believed he had formed an opinion, which he had never expressed, and which he did not think would influence his verdict. Page 157.)

"Bias is that which sways the mind toward one opinion rather than another. Therefore, a juror is biassed when from any cause or influence he is inclined toward one party to the action rather than the other; or, when in a criminal case, he is inclined to convict rather than acquit, or *vice versa*. And, in the case of one charged with crime, if a juror's bias be so strong in favor of guilt that he cannot rid himself of it without he have evidence of innocence, his retention on the panel would certainly put the accused at a disadvantage at the outset of the trial, which in a doubtful case might be the real cause of conviction, whether justly or unjustly."

Olive *vs* The State, 11 Neb., 1, 23.

"Impartiality of jurors in criminal cases requires not only freedom from any bias against the accused, but also against any prejudice against his prosecution. Between him and the State the scales are to be evenly held."

Field, J., in Hayes *vs.* Missouri, 120 U. S., 70.

"If a juror has formed an opinion that the prisoner is guilty, and entertains that opinion now, without waiting for other testimony, he is incompetent."

Taney, C. J., Whart. Crim. Prac. & Plead., § 625.

In Burr's case, Marshall, Chief Justice, said: "The great value of a trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a tribunal which may be expected to be uninfluenced by any bias of the mind. I have always conceived, and still conceive, an impartial jury as required by the common law, and as secured by the Constitution, must be composed of men who will fairly hear the testimony which may be offered to them, and bring in their verdict according to the testimony and according to the law arising on it. This is not to be expected, certainly the law does not expect it, where the jurors, before they hear the testimony, have deliberately formed and delivered an opinion that the person whom they are to try is guilty or innocent of the charge alleged against him. The jury should enter upon the trial with minds open to those impressions which the testimony and the law of the case ought to make, not with those preconceived opinions which will resist those impressions. All the provisions of law are calculated to obtain this end."

A juror in a criminal case, being challenged for principal

cause, testified that he had formed and expressed an opinion, but that he had no fixed opinion—none which could not be removed by evidence: *Held*, That he was disqualified—the court saying: "The right secured by law to a fair and impartial trial, with minds open to receive and weigh, and balanced in regard to the matters to be tried, is of the highest importance and should be kept carefully guarded by the court, especially in cases involving human life." * * * "The juror's mind was preoccupied with an opinion upon the case to be tried, and that, upon principle and by all the cases, incapacitated him as a juror."

Cancemi *vs.* The People, 16 N. Y., 501, 504–505.

The anxious and elaborate contrivances of the law, to secure the impartiality of juries, demonstrate *that* to be the essential and supreme principle of the system.

3.

The Illinois statute makes competent a juror with a preconceived and present opinion as to the guilt of the accused.

1st. "In whatever language a statute may be framed its purpose and constitutional validity must be determined by its natural and legal effect."

Henderson *vs.* The Mayor, 92 U. S., 259.

The State courts held that the statutes authorized the impanelling of jurors with an opinion as to the guilt of the accused, and, "accepting that construction, this Court may adjudge the act to be unconstitutional and void."

Hall De Cuir, 95 U. S., 485.

2d. The incompetency of a juror because of partiality is not relieved by the fact that his opinion is based "upon rumor or newspaper statements." The source or foundation of the opinion is a wholly immaterial consideration, the question being only as to the existence of the opinion.

"It is immaterial whether the belief which comes not according to law (that is, from sworn evidence in the case) is derived from rumor or from listening to statements of a more reliable source."

1 Bishop on Crim. Procedure, sec. 910.

3d. The statement of the juror that he "believes he can fairly and impartially render his verdict in accordance with the evidence" is plainly ineffectual to restore his competence. If he have a preconceived and present opinion as to the guilt of the accused he can by no effort of volition discard that opinion; for opinion and belief are not voluntary—are independent of the will—are the necessary effects of evidence and argument operative on the mind. Without some reason, good or bad, for an opinion, it is morally impossible that a man should entertain the opinion; and, having the opinion, he cannot be rid of it without some, to him, adequate reason. The most imperative hope or fear cannot make a member of the Court believe that James G. Blaine is President of the United States; or, believing that Grover Cleveland is such President, the most stimulating incitement of reward or punishment would be inoperative to remove or impair that opinion.

All the terrors of the Inquisition could not make Galileo believe the earth to be stationary, although they did avail to compel him to a *profession* of the opinion. That opinion is

involuntary, is as firm and immutable a principle of the mind as is the law of gravitation in the material universe, and is not only attested by our consciousness, but is established by demonstrative reasoning. (Locke on Human Understanding, book IV, ch. XIII, 2; Bailey on Formation of Opinion, essay 1, section 2.)

Indeed, it is only upon the hypothesis that belief is involuntary, that an argument can be made against the persecution of opinion, for if opinion be dependent upon the will then one is accountable for opinion, and punishment may constrain the will to reject the opinion.

"Under the circumstances it is idle to inquire of jurors whether they can return a just and impartial verdict; the more clear and positive were their previous impressions of guilt the more certain may they be that they can act impartially in condemning the guilty party."

Cooley, J., Stevens *vs.* The People, 38 Mich., 742.

"It is vain for a man to say or even believe that he can judge impartially of a matter which he has already determined. Human nature as developed in the average of men does not permit this. The juror is to hear and then say what he believes, but if he believe before hearing that only which can lawfully affect his belief, the testimony of witnesses in open court, he is, in legal reason, disqualified to hear and be swayed by the evidence."

1 Bishop Criminal Procedure, sec. 910.

4th. The court is required by the statute to be "satisfied of the truth of the statement." What statement? That the juror *believes* he can fairly and impartially render a verdict, &c., for this is the only statement he makes. He does not say that he *can* fairly, &c., but only that he *believes* he can,

which belief indicates only the disposition of his will, and is no proof of a power beyond the scope of human nature; but even if a juror say he can fairly and impartially try the issue in respect of which he already entertains an opinion, he merely asserts an impossibility.

5th. It is to be observed that the statute of Illinois omits the essential clause in other similar acts, namely, that the juror swear "he can render an impartial verdict uninfluenced by the opinion."

N. Y. Statute.

6th. It is apparent throughout the record that the competency of the jurors was determined by the criterion prescribed by the statute. Hence the fact that the particular juryman, upon whose examination the repugnancy of the statute to the Constitution was raised, was discharged on a challenge does not make the decision of the court sustaining the validity of the statute innocuous. Besides, the sole condition of the appellate jurisdiction of this Court is that a Federal question be presented and decided adversely to petitioners. To adjudge that such decision must be prejudicial in order to jurisdiction, would be to interpolate a substantive provision into the statute, which transcends the province of judicial power.

7th. It results that the juror, Theodore Denker, one of the panel who tried the cause, was a partial and so an incompetent juror, for he admitted that he had formed and expressed and still entertained an opinion upon the question of the defendants' guilt or innocence; that he believed what he had heard and read, and that the opinion was such as to

prevent him from rendering an impartial verdict in the case.

8th. Denker was challenged for cause, the challenge overruled, and an exception taken.

The fact that when Denker was sworn upon the jury, petitioners had not exhausted their peremptory challenges, is nothing to the purpose. The accused had a right to protect themselves as well by challenge for cause as by peremptory challenge. If the juror was obnoxious to a challenge for cause, petitioners had a right to his removal on such challenge, and the court could not compel them to expend a peremptory challenge in order to be rid of a juror whom the law itself should have discharged.

"Experience has shown that one of the most effective means to free the jury-box from men unfitted to be there is the exercise of the peremptory challenge. There may be the strongest reason to distrust the character of a juror offered from his habits and associations, and yet be difficult to formulate and sustain a legal objection to him. In such cases the peremptory challenge is a protection against his being accepted."

Hayes *vs.* Missouri, 120 U. S., 70.

4.

It is an ancient and inviolable principle of the criminal jurisprudence of this country, as of England, that the accused shall be presumed to be innocent until his guilt is shown, and, by consequence, that the burden of proving his guilt is upon the prosecution.

And it is not within the compass of legislation to change the legal presumptions of innocence.

Wyneharmer *vs.* The People, 13 N. Y., 447.

"The clauses in question subvert the presumption of innocence which heretofore, under the universally-recognized principles of the common law, were supposed to be fundamental and unchangeable. They assume that the parties are guilty, and they call upon the parties to establish their innocence."

Cummings *vs.* The State, 4 Wallace, 328.

But, with a juror having a present opinion as to the guilt of the accused, the presumption of innocence is already displaced and the burden of proof transferred to the accused.

It results, therefore, that if the term "due process of law," when applied to judicial proceedings, "mean a course of legal proceeding according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights" (Pennoyer *vs.* Neff, 95 U. S., 714), then a proceeding in a capital cause which withholds from the accused the presumption of innocence and imposes upon him the burden of disproving his guilt, is not "due process of law."

B.

By the Fourteenth Amendment of the United States' Constitution, which forbids any State to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," the Illinois statute is condemned as repugnant to that provision of the fundamental law.

1.

What are the "privileges and immunities of citizens of the United States," in the sense of this amendment, has not yet been settled by exhaustive analysis or definite formula;

but, by reference to the original amendments to the Constitution, we may discover, with infallible certainty, what are some of those rights and immunities; for when the Constitution of the nation enumerates certain rights and liberties as inherent and inviolable in its citizens—inviolable even by its own action—we may know that those rights and liberties constitute privileges and immunities of citizens of the United States.

Now, in article V of the amendments to the Constitution we read that "no person shall be compelled in any criminal case to be a witness against himself," and in article VI that "in all criminal prosecutions the accused shall enjoy the right to a trial by an *impartial* jury."

If, then, the right to an impartial jury be a privilege and immunity of American citizens, the statute of Illinois, in denying the petitioners trial by an impartial jury, conflicts with this provision of the Fourteenth Amendment.

"An equal right to an impartial jury is placed by the Fourteenth Amendment under the protection of the General Government, and guaranteed by it."

Ex Parte Virginia, 100 U. S., 345.

C.

The record discloses to demonstration, that some of the petitioners were, by the production in evidence of papers and property unlawfully seized and taken, compelled to be witnesses against themselves.

Boyd *vs.* United States, 16 U. S.

That no man is compellable in a criminal cause to give evidence against himself has always been a constitutional

safeguard of the English government. When Felton was arrested for the assassination of the Duke of Buckingham Charles I desired him to be put upon the rack; but all the judges of England unanimously resolved that torture was illegal—upon the principle that a man was not compellable to criminate himself.

2 Hallam's Constitutional History, 7; Coke, 3d Institute, 35.

"The clause prohibiting any person from being compelled in any criminal case to be a witness against himself, is but an affirmance of a common-law privilege, but it is of inestimable value."

2 Story on Constitution, sec. 1788.

The immunity from compulsory testimony against himself in a criminal cause, secured to the American citizen by the Fifth Amendment, is a restraint only on the action of the Federal Government; but the Fourteenth Amendment is a restriction on State action, and this amendment, in forbidding a State to deprive a person of life or liberty without due process of law, guarantees to every person an immunity from giving evidence against himself under compulsion of State authority—compulsion to be a witness against oneself in a criminal cause not being in conformity with due process of law. It results, furthermore, from argument B that the immunity from self-accusing evidence, being a privilege and immunity of American citizenship, was abridged by the action of the State court in compelling petitioners to be witnesses against themselves.

That the action of the State judiciary is the action of the State, is the settled law of this Court. (*Ex Parte* Virginia,

100 U. S., 339–347; Strauter *vs.* W. Va., 100 U. S., 303–310; Virginia *vs.* Rives, 100 U. S., 313–318; Neal *vs.* Delaware, 103 U. S., 370–397; Civil Rights Case, 109 U. S., 3, 11, 13, 15; Yick Wo *vs.* Hopkins, 118 U. S., 366, 373–'4.)

D.

As bearing upon all the preceding points it is submitted:

At the time of the adoption of the United States Constitution, with its original amendments, it was supposed that the people of the United States had ample protection against the encroachments of power upon their fundamental rights and liberties—protection against the Federal Government by those amendments, and protection against the States by identical or equivalent guarantees in their own constitutions. After the war of secession, however, it was disclosed by the action of several States, that the securities of their organic law were inadequate to the protection of the colored population. This fact, unforeseen by the framers of the original Constitution, suggested to the people of the United States that their rights and liberties should be taken under the guardianship of the supreme sovereignty of the nation. Accordingly the Fourteenth Amendment was adopted, and the obvious effect of this amendment is to restrain the States from any invasion or violation of the fundamental rights and liberties of the people. By one clause of the Fourteenth Amendment "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;" and by another clause "no State shall deny to any person within its jurisdiction the equal protection of the law."

Plainly, if this were all, the great body of fundamental rights and liberties inhering in the people would be without sufficient security. To guard and protect those rights and liberties the Fourteenth Amendment further provides that "no State shall deprive any person of life, liberty, or property without due process of law."

The effect of this last provision is to transfer the fundamental rights and liberties enumerated in the original amendments and incorporate them in the Fourteenth Amendment; so that all the fundamental rights, privileges, and immunities of American citizenship recognized in the original Constitution, are now placed under the ægis of the national sovereignty; and not one of those rights, privileges, and immunities, can be invaded or violated by State action without affording the victim the right of recourse to this tribunal for redress of the wrong.

"In fine, the Fourteenth Amendment was enacted to supply a great want which had existed from the commencement of the Government. While the States were, from the outset, forbidden to pass *ex post facto* laws or bills of attainder, or laws impairing the obligation of contracts, they might in any other manner invade the rights of citizens and the national courts could grant no relief. This beneficent amendment throws the protections of the nation, of its Congress and its courts, around the lives, liberty, and property of all its citizens, and enables the Supreme Tribunal to annul all oppressive laws which the partisanship of local courts might, perhaps, sustain. * * * "National citizenship always existed, and the essential of these immunities resulting from it is the *protection* due from the nation to its citizens in all places and at all times. This protection could always be exercised by the National Government over its citizens in other countries or on the high seas, but until

the Fourteenth Amendment was passed there was not the same facility, there was not the same means and instruments for exercising that protection over its citizens when at home and within the territory of a State. This want, this *casus omissus*, is now supplied, and the nation, through its Congress and its courts, can afford to its citizens at home complete protection against the discriminating legislation of the States which may attempt to invade their privileges and immunities."

Pomeroy's Constitutional Law, pp. 178, 179, 154, 155.

Respectfully submitted.

ROGER A. PRYOR,
Of Counsel for Petitioners.

123-131

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

AUGUST SPIES ET AL.

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

PETITION FOR WRIT OF ERROR.

BRIEF RESISTING PETITION.

GEORGE HUNT,
Attorney General, State of Illinois.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

AUGUST SPIES ET AL.

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

APPLICATION FOR WRIT OF ERROR.

BRIEF IN RESISTANCE OF THE PETITION.

To warrant the issuance of the writ it must appear from the record—

1. That there is a Federal question involved; and—

2. It must appear from the record that such question was raised and decided in the State court.

I.

The record does not show that any Federal question is involved.

"From the beginning it has been held to give us jurisdiction in this class of cases (error to State courts) it must appear affimatively on the face of the record, not only that a Federal question was raised and presented to the highest

court of the State for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case. Murdock *vs.* Memphis, 20 Wall., 590, 636."

Chouteau *vs.* Gibson, 111 U. S., 200.
Germania Ins. Co. *vs.* Wisconsin, 119 U. S., 473.

The prohibitions contained in the first ten amendments to the Constitution are limitations on the powers of the Federal Government and not upon the States.

Story on Const., §§ 1904, 1947.
U. S. *vs.* Cruikshank, 92 U. S., 542.
Walker *vs.* Sauvinet, 92 U. S., 90.
Presser *vs.* Illinois, 116 U. S., 267.

So far as petitioners rely upon anything contained in those amendments they can have no standing in this Court.

The Fourteenth Amendment is equally foreign to any right, privilege, or immunity here claimed by the petitioners.

"But those amendments apply only to such offenses as may be taken cognizance of and punished by the Federal Government, and not at all to those which are offenses only against the peace and dignity of the several States.

"The States, in the inforcement of their own laws for the preservation of peace and order, may dispense with the grand jury if the Legislature shall so provide, and they may make all State offenses triable before a single judge instead of by a jury, if that mode of trial shall be thought most politic or most conducive to justice; and no more under the fourteenth article, than previously, can the Federal Government interfere with the mode prescribed for the trial of State offenses. Whatever is established will be due process of law, so that it be general and impartial in operation and disregard no provision of Federal or State Constitution."

Story Const., § 1947.

The Fourteenth Amendment declares—

"No *State* shall make or enforce *any law* which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The record will show that the complaint is not that the *State* has made or is enforcing a *law* which deprives the petitioners of any of the privileges or immunities guaranteed by that section, but that they are deprived of rights by an erroneous construction of the law, placed upon it by the trial court of the State.

Petitioners did not claim in the supreme court of the State that the Illinois act of 1874 was repugnant to the Constitution, treaties, or laws of the United States, nor that the authority of the court was exercised under it, but that the act was constitutional and valid and the court exercised its power in violation of that law.

Petitioners were tried in the courts of the State under the laws of the State, and that constitutes *due process of law.* It is not material that this or another court might have ruled differently under the law.

Due process of law means "law of the land." Story, sec. 1943.

"Due process of law in each particular case means such an exertion of the powers of Government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs."

Story on Const., sec. 1945.
Yick Wo *vs.* Hopkins, 118 U. S., 367.

"Due process of law" is, in accordance with the law of the land.

A trial by jury in suits at common law pending in the State courts is not a privilege or immunity of National citizenship which the States are forbidden by the Fourteenth Amendment of the Constitution of the United States to abridge.

Walker *vs.* Sauvinet, 92 U. S., 90.

Section 5 of the Fourteenth Amendment declares: "The Congress shall have power to enforce by appropriate legislation the provisions of this Article." This clearly implies that the powers and prohibitions therein contained were to be made effective by act of Congress, and in pursuance thereof the Congress passed an act entitled "An act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes," approved April 20, 1871.

The third section of the act declares:

"That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any State shall so obstruct or hinder the execution of the laws thereof and of the United States as to deprive any portion or class of the people of such State of any of the rights, privileges, immunities, or protection named in the Constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect or shall from any cause fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States."

This is a legislative construction placed by Congress upon the Fourteenth Amendment, and it also defines what shall be deemed a denial by the State of the equal protection of the laws.

The last clause of the amendment, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts which the State might

establish, as to subject-matter, amount, or finality of their decisions, if *all* persons within the territorial limits of their respective jurisdictions have an equal right in like cases and under like circumstances to resort to them for redress; and the State may establish one system of courts for cities and another for rural districts.

Missouri *v.* Lewis, 101 U. S., 22.

"And we may add that the *systems* of *procedure* in them may be different without violating any provision of the Fourteenth Amendment."

Hayes *v.* Missouri, 120 U. S., 68.

This Court held a law of the State of Missouri, which provided that in capital cases in cities having over 100,000 inhabitants the State should be entitled to fifteen peremptory challenges, but outside such cities the State should have but eight peremptory challenges, to be valid, and held that such a law did not deny to a person tried for murder within a city of 100,000 inhabitants the equal protection of the laws; that it was an exercise of the discretion of the Legislature in declaring how an impartial jury should be obtained.

Hayes *v.* Missouri, 120 U. S., 68.

The Court said:

"Experience has shown that one of the most effective means to free the jury-box from men unfit to be there is the exercise of the peremptory challenge. * * *

"The number of such challenges must necessarily depend upon the discretion of the Legislature, and may vary according to the condition of different communities and the difficulties in them of securing intelligent and impartial jurors. *The whole matter is under its control.* Stokes *v.* People, 53 N. Y., 164. Walter *v.* People, 32 N. Y., 147, 159. Commonwealth *v.* Dorsey, 103 Mass., 412, 418."

"Class legislation discriminating against some and favoring others is prohibited; but legislation which, in carrying out a public purpose, is limited in its application if within the sphere of its operation it *affects alike all persons similarly situated*, is not within the amendment."

Barbier *v.* Connolly, 113 U. S., 32.

Approved in—

Yick Wo *v.* Hopkins, 118 U. S., 367.

Hayes *vs.* Missouri, 120 U. S., 72.

The provision in the 14th Amendment, that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, does not prevent a State from passing such laws to regulate the privileges and immunities of its own citizens as do not abridge their privileges and immunities as citizens of the United States.

Presser *v.* People, 116 U. S., 252.

No right adhered to the petitioners by virtue of their being citizens of the United States, *eo facto*, which is in any way infringed by any proceeding complained of in this case.

The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the National Government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof; and it is these which are placed under the protection of Congress by this clause of the Fourteenth Amendment.

Slaughter-House Cases, 16 Wall., 36.

"Certainly a State cannot be deemed to be guilty of a violation of this constitutional obligation" (that no State shall deprive any person of life, liberty, or property without due process of law) "simply because one of its courts, while acting within its jurisdiction, has made an erroneous deci-

sion. The Legislature of a State performs its whole duty under the Constitution in this particular when it provides a law for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish the parties the necessary constitutional protection. All after that pertains to the courts, and the parties are left to the appropriate remedies for the correction of errors in judicial proceedings."

Arrowsmith *v.* Harmoning, 118 U. S., 194.
Lehigh Water Co. *v.* Easton, 121 U. S., 388.

"There is in our political system a government of each of the several States, and a Government of the United States. Each is distinct from the others, and has citizens of its own, who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State; but his rights of citizenship under one of these governments will be different from those he has under the other."

"Sovereignty, for the protection of the rights of life and personal liberty within the respective States, rests alone with the State."

U. S. *v.* Cruikshank *et al.*, 92 U. S., 542.

II.

It must appear from the record that a Federal question was raised and decided in the State court.

A suit cannot be said to be one arising under the Constitution or laws of the United States until it has in some way been made to appear on the face of the record that "some title, right, privilege, or immunity on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States or sustained by an opposite construction. Starin *v.* New York, 115 U. S., 248."

Germania Ins. Co. *v.* Wisconsin, 119 U. S., 473.
Ames *v.* Kansas, 111 U. S., 449.

If it does not appear affirmatively that the Federal question raised here was raised in the Court below and was de-

cided, and that its decision was necessary to the judgment rendered, this Court has no jurisdiction in error over the judgment of such State Court.

Detroit R'y Co. *v.* Guthard, 114 U. S., 133.
Savings Bank *v.* Savings Ass'n, 114 U. S., 265.
Chouteau *v.* Gibson, 111 U. S., 200.
Santa Cruz Co. *v.* R. R. Co., 111 U. S., 361.
Murdock *v.* Memphis, 20 Wall., 590.

"Writs of error to State Courts have never been allowed, as of right. It has always been the practice to submit the record of the State Courts to a judge of this Court, whose duty it has been to ascertain upon examination whether any question, cognizable here upon appeal, was *made* and *decided* in the proper Court of the State, and whether the case upon the face of the record will justify the allowance of the writ.

"In general, the allowance will be made where the decision appears to have involved a question within our appellate jurisdiction; but refusal to allow the writ is the proper course when *no such question* appears *to have been made* or *decided;* and also where, although a claim of right under the Constitution or laws of the United States may have been made, it is nevertheless clear that the application for the writ is made under manifest misapprehension as to the jurisdiction of this Court."

Twitchell *v.* Commonwealth, 7 Wall., 321.

In that case application for a writ of error was made on the ground that a statute of the State of Pennsylvania, providing that "in an indictment for murder it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused; but it shall be sufficient, in every indictment for murder, to charge that the defendant did feloniously, wilfully, and of malice aforethought, kill and murder the deceased," was repugnant to that provision of the sixth amendment of the Constitution of the United States, which declares that "in all criminal

prosecutions the accused shall enjoy the right" "to be informed of the nature and cause of the accusation against him."

The Court expresses itself as of opinion that it would be its duty to grant the writ if it were an open question, whether the fifth and sixth amendments apply to State governments, and says—

"But the scope and application of these amendments are no longer subjects of discussion here.

"In the case of Barron *vs.* The City of Baltimore [7 Pet., 243], the whole question was fully considered upon a writ of error to the Court of Appeals of the State of Maryland. The error alleged was that the State Court sustained the action of the defendant under an act of the State Legislature, whereby the property of the plaintiff was taken for public use in violation of the fifth amendment."

The Court then quote from Chief Justice Marshall, in the case of Barron *v.* City of Baltimore:

"The Constitution was ordained and established by the people of the United States for themselves, for *their own government*, and *not* for the government of the individual States." * * *

"The powers they conferred on this Government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally and, we think, necessarily applicable to the government created by the instrument. *They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes.*"

And referring to the first twelve amendments, he said:

"These amendments contain no expression indicating an intention to apply them to State governments. This court cannot so apply them."

And to the same effect or in support thereof are:

Fox *v.* Ohio, 5 How., 434.

Smith *v.* Maryland, 18 How., 76.

Withers *v.* Buckley *et al.*, 20 How., 90.

THE JURY.

We do not see how the *personnel* of the jury which tried petitioners in this case can properly be submitted to the court or considered by it in the present proceeding.

This inquiry must be made as to the constitutionality of the jury law of the State of Illinois, and not as to how a State court may have construed that law. Counsel for petitioners have, however, seen proper to call the attention of the court to this subject in their brief. It will be observed that but two members of the jury which tried this case have been seriously attacked. These are Denker and Sanford.

In support of the objections made to Denker counsel have presented to the court a portion of his examination.

We take it for granted that before his qualifications as a juror could be reviewed by this or any other court his entire examination upon which his qualification was determined by the trial court must be presented in the record; that portion presented by counsel for petitioners is so partial and limited as to be unfair both to the juror and the court.

We deem it only necessary to suggest in this connection that petitioners are in no position to question the qualifications of this juror in any court. After challenging him for cause and a further examination as to his qualifications they accepted him and tendered him to the prosecution as a juror. At this time the petitioners had 142 peremptory challenges at their command, and did not choose to use one of them to displace this man from the jury box.

That his examination showed him to be a properly qualified juror, not only under the Statute of Illinois, but at common law we confidently submit.

At the time that the eleventh juror was accepted the petitioners had still forty-three peremptory challenges at their command. All of these were exhausted before the juror Sanford was called into the box. The record shows the manner in which they were used.

As it was in the power of petitioners to excuse any one or all of the jurors who tried this cause, except the last one, it is only necessary to refer to his examination to determine his qualifications.

Not having access to the transcript of the record in the case we quote from the opinion of the supreme court of the State of Illinois the material part of the examination of the juror, Sanford, the twelfth and last juror chosen.

QUESTIONS BY THE DEFENSE.

Question. Have you an opinion as to whether or not there was an offense committed at the Haymarket meeting by the throwing of the bomb?

Answer. Yes.

Question. Now, from all that you have read and all that you have heard, have you an opinion as to the guilt or innocence of any of the eight defendants of the throwing of the bomb?

Answer. Yes.

Question. You have an opinion upon that question also?

Answer. I have. * * *

Question. Now, if you should be selected as a juror in this case to try and determine it, do you believe that you could exercise legally the duties of a juror; that you could listen to the testimony, and all of the testimony, and the charge of the court, and after deliberation return a verdict which would be right and fair as between the defendants and the people of the State of Illinois?

Answer. Yes, sir.

Question. You believe you could do that?

Answer. Yes, sir.

Question. You could fairly and impartially listen to the testimony that is introduced here?

Answer. Yes.

Question. And the charge of the court and render an impartial verdict, you believe?

Answer. Yes.

Question. Have you any knowledge of the principles contended for by socialist, communists, and anarchists?

Answer. Nothing except what I read in the paper.

Question. Just general reading?

Answer. Yes.

Question. You are not a socialist, I presume, or a communist?

Answer. No, sir.

Question. Have you a prejudice against them from what you have read in the papers?

Answer. Decided.

Question. Do you believe that would influence your verdict in this case, or would you try the real issue which is here, as to whether these defendants were guilty of the murder of Mr. Degan or not, or would you try the questions of socialism and anarchism, which really has nothing to do with the case?

Answer. Well, as I know so little about it in reality at present, it is a pretty hard question to answer.

Question. You would undertake—you would attempt, of course—to try the case upon the evidence introduced here upon the issue which is presented here?

Answer. Yes, sir. * * *

Question. Well, then, so far as that is concerned, I do not care very much what your opinion may be now, for your opinion now is made up of random conversations and from newspaper reading, as I understand.

Answer. Yes.

Question. That is nothing reliable. You do not regard that as being in the nature of sworn testimony at all, do you?

Answer. No.

Question. Now, when the testimony is introduced here, and the witnesses are examined, you see them and look into their countenances, judge who are worthy of belief and who are not worthy of belief, don't you think then you would be able to determine the question?

Answer. Yes.

Question. Regardless of any impression that you might have, or any opinion?

Answer. Yes.

Question. Have you any opposition to the organization by laboring men of associations or societies or unions, so far as they have reference to their own advancement and protection, and are not in violation of law?

Answer. No, sir.

Question. Do you know any of the police force of the city of Chicago?

Answer. Not one by name.

Question. You are not acquainted with any one that was either injured or killed, I suppose, at the Haymarket meeting?

Answer. No.

Question. If you should be selected as a juror in this case, do you believe that, regardless of all perjudice or opinion which you now have, you could listen to the legitimate testimony introduced in court, and upon that, and that alone, render and return a fair and impartial, unprejudiced, and unbiased verdict?

Answer. Yes.

The foregoing examination was by the defense.

The following was by the State:

Question. Upon what is your opinion founded—upon newspaper reports?

Answer. Well, it is founded on the general theory and what I read in the newspapers.

Question. And what you read in the papers?

Answer. Yes, sir.

Question. Have you ever talked with any one that was present at the Haymarket at the time the bomb was thrown?

Answer. No, sir.

Question. Have you ever talked with any one who professed of his own knowledge to know anything about the connection of the defendants with the throwing of that bomb?

Answer. No.

Question. Have you ever said to any one whether or not you believed the statements of facts in the newspapers to be true?

Answer. I have never expressed it exactly in that way, but still I have no reason to think they were false.

Question. Well, the question is not what your opinion of that was. The question simply is—it is a question made necessary by our statute, perhaps.

Answer. Well, I don't recall whether I have or not.

Question. So far as you know, then, you never have?

Answer. No, sir.

Question. Do you believe that, if taken as a juror, you can try this case fairly and impartially, and render a verdict upon the law and the evidence?

Answer. Yes.

An examination of the statutes of the several States will disclose the fact that many of them have passed laws relating to the qualifications of jurors similar to the law of the State of Illinois, the validity of which is brought in question by petitioners in this case.

In Arkansas the bias to excuse is "such a bias as satisfies the court that the juror cannot try the case impartially."

In Colorado no person shall be disqualified by previously formed or expressed opinion if the "court shall be satisfied from the examination of the juror or from other evidence that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial of such cause."

In Michigan:

"The previous formation or expression of opinion or impression, not positive in its character, in reference to the circumstances upon which any criminal prosecution is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, such opinion or impression not being positive in its character, or not being based on personal knowledge of the facts in the case, shall not be sufficient cause of challenge, * * * provided the person shall declare on oath that he verily believes he can render an impartial verdict according to the evidence submitted to the jury, and provided the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror."

In New York:

"The previous formation or expression of an opinion or impression in reference to the circumstances upon which any criminal action at law is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, shall not be a sufficient ground of challenge for principal cause to any person who is otherwise legally qualified to serve as a juror upon the trial of such action, provided the person proposed as a juror, who may have formed or expressed or has such opinion or impression as aforesaid, shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on such trial, and that such previously formed opinion or impression will not bias or influence his verdict, and provided that the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror."

N. Y. Stat., 373.

The foregoing statute has been passed upon by the highest court of that State in the following cases:

Stokes *v.* People, 53 N. Y., 171.
Thomas *v.* People, 67 N. Y., 220.
Phelps *v.* People, 72 N. Y., 363.
Greenfield *v.* People, 74 N. Y., 277.
Balbo *v.* People, 80 N. Y., 484.
Cox *v.* People, 80 N. Y., 512.
People *v.* Otto, 101 N. Y., 690.

In Nebraska:

"If a juror shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused the court shall thereupon proceed to examine on oath such juror as to the ground of such opinion, and if it shall appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transaction, or reading reports of their testimony, or hear-